FILE COPY

IN THE

Supreme Court of the United States

October Term, 1959

No. 581

GERALD DUNITZ, *et al.*,

Appellants,

vs.

THE CITY OF LOS ANGELES, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

STATEMENT OF JURISDICTION.

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Appellants,

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THE CITY OF LOS ANGELES, *et al.*,

Appellees.

STATEMENT OF JURISDICTION.

This statement declares the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the decision of the District Court of Appeal of the State of California in case 2nd Civil No. 23490, which affirmed a judgment of the Superior Court of the State of California, in and for the County of Los Angeles, in favor of appellees.

Opinions Below.

The opinion of the District Court of Appeal of the State of California is reported in 170 Advance California Appellate Reports, page 490, and at 338 Pacific 2d, page 1001. A copy of said opinion is Appendix "A". The subsequent order of the Supreme Court of the State of California denying hearing in this cause is reported at

52 Advance California Reports, Volume 12, Minutes, page 2, (July 24, 1959). The unpublished "Memorandum Re Decision" of the Superior Court of the State of California in and for the County of Los Angeles, is a part of the record herein. A copy of said memorandum is Appendix "B".

Grounds on Which Jurisdiction of This Court Is Invoked.

1. This is an appeal from a decision of the District Court of Appeal of the State of California affirming a judgment of the Superior Court of the State of California in and for the County of Los Angeles dismissing the action for declaratory and injunctive relief upon the sustaining of appellees' demurrer, without leave to amend, to appellants' complaint as amended.

2. Appellants' petition for rehearing in the District Court of Appeal of the State of California was denied on June 15, 1959, and Petition for hearing was denied by the Supreme Court of California on July 15, 1959. The District Court of Appeal is, therefore, the highest court of the State of California in which a decision may be had in this case. Notice of appeal to the United States Supreme Court was filed on October 9, 1959, with the Clerk of the District Court of Appeal of the State of California, 2nd Appellate District, Los Angeles, California.

3. The jurisdiction of this court on appeal is conferred by 28 U. S. C. A. Section 1257 (2).

4. Cases believed to sustain jurisdiction are:
The Supreme Court of the United States has jurisdiction on appeal from the highest state court of a judg-

ment upholding a municipal ordinance against claimed violation of the Constitution of the United States.

Staub v. City of Baxley, 355 U. S. 313, 318-319, 78 S. Ct. 277, 2 L. Ed. 2d 302, 309;

Jamison v. State of Texas, 318 U. S. 413, 414, 63 S. Ct. 669, 87 L. Ed. 869, 871;

John P. King Manufacturing Company v. City Council of Augusta, 277 U. S. 100, 110-112, 48 S. Ct. 489, 72 L. Ed. 801, 810.

5. The challenged ordinance sections constitute Chapter 6, Article 9 (Secs. 96.100-96.128) of the Los Angeles Municipal Code and are set forth in Appendix "C". They are summarized as follows:

Section 96.100 declares the purpose of the ordinance to be to provide a just and practicable method whereby unsafe buildings may be repaired, vacated, or demolished.

Section 96.101 (a) sets forth definitions of what shall constitute a "dangerous" building.

Section 96.101. 2 declares that a "dangerous" building, as defined in Section 96.100 is a "public nuisance".

Section 96.102, 96.103 and 96.104 authorize inspection of buildings by the Superintendent of Building and filing of a report with appellee Board. If the Board or Superintendent determines that there is probable cause to believe that a building is dangerous, notice is required (Secs. 96.106-96.110) to be given to interested parties, a hearing held, and findings of fact made.

Section 96.112 then provides *inter alia* that:

"(a) . . .;

"(b) . . .;

"(c) In any case where a dangerous building is 50 per cent damaged, or decayed, or deteriorated, it *shall* be demolished.

"(d) In all cases where a dangerous building . . . cannot be repaired so that it will no longer exist in violation of the terms of this division, it *shall* be vacated and demolished.

"(e) In all cases where a dangerous building . . . is a fire hazard, existing or erected in violation of the terms of this division or any ordinance of this City, or statute of the State of California, it *shall* be demolished." (Emphasis added)

Section 96.115 commands the Board to issue an order to demolish if the building is found to be "dangerous" within the said definitions of sub-sections (c) (d) or (e) of Section 96.112 above.

Section 96.118 makes it a misdemeanor to fail to comply with such order.

Sections 96.119-126 provide for assessing the cost of demolition as a lien on the property and for its enforcement.

Section 96.127 declares that the enactment of Sections 96.100-128 is not intended to repeal by implication any other provision of the Los Angeles Municipal Code.

Section 96.128 is a separability clause.

Questions Presented by This Appeal.

The following questions are presented by this appeal:

1. Do the said Sections of the Los Angeles Municipal Code on their face deprive appellants of due process of law or deny them equal protection of the laws under the Fourteenth Amendment of the Constitution?

2. Do said code sections deprive appellant of due process of law or deny them equal protection of the laws under the Fourteenth Amendment of the Constitution as said sections are applied by appellees in the pending administrative proceedings?

Appellants' Basic Contentions on This Appeal.

1. That notwithstanding the purported lawful purpose and traditional quasi-judicial form of the ordinance, it is unconstitutional on its face because it mandatorily requires appellee Board to order appellants' buildings to be demolished merely because they cannot be made to comply with the present building code of the City of Los Angeles, but without any showing that they are nuisances in fact, or that, if they are, the public interest justifies their destruction.

2. The procedure pursued by appellees in the enforcement of said ordinance as to appellants' property violates said constitutional guarantees of due process and equal protection of the laws.

Concise Statement of the Case.

Appellants are the owners of thirty buildings located upon twelve-and-a-half acres of land situated in the City of Los Angeles, State of California. [R. p. 13, lines 30-32, p. 14, lines 1-12.][1] On or about December 27, 1956, and on several subsequent occasions, appellants received written notices from appellees that appellees had instituted proceedings under Chapter 6, Article 9, of the Los Angeles Municipal Code requiring appellants to show cause why said buildings should not be ordered demolished on the ground that they constitute "dangerous buildings" and "nuisances". [R. p. 20, line 16, to p. 25, line 1, p. 26, line 24, to p. 27, line 13.]

Said notices do not accurately describe the land upon which the said buildings are situated in that some of the buildings referred to in said notices are not located on the land described in said notices and the land on which each of said buildings is located is not separately described, but all are incorrectly stated to be located on a single parcel of land. [R. p. 27, lines 2-7.] Appellants requested appellees to correct the incorrect description and to give a separate description for each building alleged to be defective. Appellees refused to do so. [R. p. 28, lines 17-29.]

Several of appellants' buildings are of wooden construction, and, as such, although they were lawful when built, [R. p. 26, lines 3-11.] could not be constructed in their present location under the current building code.

The property here involved has a market value in excess of one million dollars. [R. p. 14, lines 11-12.] It

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[1]Reference to the record in this cause are cited as [R. p. ...., line .....]

would cost appellants not less than twenty-five thousand dollars to defend said property in said administrative proceeding. [R. p. 32, lines 26-31.]

Appellants filed their complaint for declaratory relief and injunction in the Superior Court of the State of California in and for the County of Los Angeles, praying for judgment that said Municipal Code sections be declared unconstitutional; that appellees be enjoined from further maintenance and prosecution of said administrative proceeding and for such other relief as shall be proper. [R. p. 37, line 26, to p. 38, line 11.] Said complaint, together with the amendment thereto, is reproduced at pages 13-43 and 51-80 of the record herein. It is therein alleged that said ordinance is unconstitutional upon its face and as applied by the appellees in said administrative proceeding, under the Fourteenth Amendment of the Constitution of the United States of America, in that said ordinance deprives appellants of due process of law, and denies them equal protection of the laws. The constitutional question was, therefore, raised at the earliest possible moment. Said issue was raised by the allegations of said pleading, at R. pp. 28-37 and in the amendment to the complaint at R. pp. 51-79.

Appellees filed a general demurrer. [R. pp. 44-45.] Hearing was held by the Superior Court, Honorable Leon T. David, Judge, presiding. Appellants at that time urged the unconstitutionality of the ordinance under the Fourteenth Amendment, and their right to an adjudication of that unconstitutionality prior to completion of administrative processes. Leave was thereupon granted to amend the complaint and the Amendment to Complaint [R. pp. 51-80] was accordingly filed. A ruling was subsequently entered on May 2, 1958, sustaining appellees' demurrer with-

out leave being granted to appellants to further amend their complaint. [R. pp. 81, 82-112.] This was the court's only ruling on the constitutional issue. Judgment for defendants was thereafter entered as of course on May 26, 1958. [R. pp. 113-114.]

Appellants thereafter perfected their appeal to the District Court of Appeal of the State of California for the Second Appellate District. It was stipulated by counsel that, pending final determination of the case, the said administrative proceeding would be held in status quo and that on appeal appellants would not contend that leave to further amend the complaint should have been granted by the Superior Court. This stipulation is being observed by the parties. On appeal, appellants again urged in briefs and argument the unconstitutionality of the ordinance and of its application to appellants under the Constitution of the United States and appellants' right to a determination of the constitutional questions prior to the completion of administrative processes. On May 18, 1959, said Court filed its decision and entered its ruling affirming the judgment below. [R. pp. 122-129.]

Appellants, subsequent petition for rehearing was denied. [R. p. 130.]

Upon such denial, appellants petitioned the Supreme Court of the State of California for hearing. The Petition for Hearing raised the constitutional questions raised below. Said petition was denied by said Court on July 15, 1959. [R. p. 132.] Appellants then noticed their appeal to the Supreme Court of the United States for the review of the federal constitutional questions presented.

The Federal Questions Here Presented Are Substantial.

1. The City of Los Angeles Claims Power to Destroy Valuable Buildings Under Its Police Power, Without Compensation to the Owner and Without Proof That They Are Nuisances in Fact or That the Public Safety Requires Their Destruction.

The complaint as amended shows that appellee City is engaged in a comprehensive program of municipal "rehabilitation," [R. pp. 29-31] in which the challenged ordinance is used to destroy valuable private property, without compensation to the owners, for a supposed public advantage on the pretext that the property is so dangerous to public safety as to require its destruction under the police power. Such drastic use of police power for such purposes is without known precedent. It subverts the private property rights guaranteed by the United States Constitution. The courts of California, other states and of the United States have emphatically condemned similar efforts of local authorities to accomplish supposed public advantages by uncompensated demolitions. The understandable desire of the appellees to modernize the central area of the City of Los Angeles does not warrant the unconstitutional method chosen to accomplish it.

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 416, 67 L. Ed. 322, 326, 43 S. Ct. 158;

Panhandle E. Pipe Line Co. v. State Highway Com., 294 U. S. 613, 621-622, 79 L. Ed. 1090, 1096-1097, 55 S. Ct. 563;

Sweet v. Rechel, 159 U. S. 380, 397-398, 40 L. Ed. 188, 195, 16 S. Ct. 43.

The opinion of the California District Court of Appeal walks around this issue by stating that appellants are not

entitled to judicial protection until, after a futile expenditure of $25,000.00 by appellants in defense of their property, respondent Board has made an order condemning that property to destruction. (App. A. pp. 6-8.)

The constitution of the United States does not require the pursuit of an administrative remedy at great expense, when, as here, the outcome of the administrative proceedings is a foregone conclusion, and the underlying legislation is itself invalid.

Staub v. Baxley, 355 U. S. 313, 318-319, 2 L. Ed. 2d 302, 309, 78 S. Ct. 277;

Lovell v. Griffen, 303 U. S. 444, 452-453, 82 L. Ed. 949, 954, 58 S. Ct. 666;

Smith v. Cahoon, 283 U. S. 553, 562, 75 L. Ed. 1264, 1272, 51 S. Ct. 582.

Due to the increasing importance of the administrative function, and, in the instant cause, the high value of the rights involved, it is increasingly important to parties facing administrative jeopardy that the underlying ordinance be valid and that parties be assured a fair hearing in accordance with constitutional guarantees of due process and equal protection.

Speiser v. Randall, 357 U. S. 513, 520-521, 2 L. Ed. 2d 1460, 1469, 1470, 78 S. Ct. 1332;

Morgan v. United States, 304 U. S. 1, 14-15, 82 L. Ed. 1129, 1130, 58 S. Ct. 723.

The challenged ordinance declares that a wooden building in a fire district is a "public nuisance" that "shall" be abated *by demolition* (App. C. Sec. 96.101 (a) (13)). No discretion is vested in respondent Board; its mandatory duty is to order such a building destroyed regardless of whether it is in fact hazardous to the public safety

(App. C, Sec. 96.112 (c)). Four of appellants' buildings are of that character. [R. pp. 23-24, items (2), (3), (26), (27).] The assertion of the power to declare things to be public nuisances by epithet and legislative fiat has been condemned by this Court as

> ". . . a doctrine not to be tolerated in this country."
>
> *Yates v. Milwaukee*, 10 Wall 497, 19 L. Ed. 984, 986.

The unconstitutional nature of this attempt to make wooden buildings demolishable *per se* regardless of the facts is declared in *Armstead v. City of Los Angeles*, 152 Cal. App. 2d 319, 324, 313 P. 2d 127, 132. This issue is ignored in the opinion of the California District Court of Appeal.

2. The California Courts Have Herein Denied Judicial Protection of Property Rights Guaranteed by the Constitution of the United States.

The California District Court of Appeal declined to enjoin enforcement of the challenged ordinance upon the ground that the Superior Court did not abuse its discretion in allowing the administrative proceeding to continue in the absence of averment of facts to show that appellants' buildings are not nuisances in fact. The District Court of Appeal, in its opinion reported in 170 A. C. A. 490, stated at page 494 (App. A., pp. 4-5):

> ". . . it cannot be determined from the complaint what the nature or character of the deficiencies in the plaintiffs' buildings are asserted to be and it cannot therefor be determined whether plaintiffs will be adversely affected by the numerous sections of the ordinance here attacked, in the proceedings commenced by the defendants."

The unexpressed premise for the above conclusion is that if appellants' buildings are all nuisances in fact, appellants cannot complain if those nuisances are ordered abated by complete extinction, notwithstanding that the means employed for so doing are unconstitutional and would not otherwise be countenanced.

That proposition has no applicability here because it is admitted by appellees that five of appellants' thirty buildings subjected to attack as an entirety are not defective in any way [R. p. 24, line 31, to p. 25, line 1], yet all must be defended against the omnibus charge of "nuisance" and against the asserted liability of all to a lien for the cost of demolition, although only one or none is ordered demolished.

Since the challenged ordinance creates a special proceeding which provides for criminal penalties and civil forfeitures, the ordinance is to be strictly construed.

Guessfeldt v. McGrath, 342 U. S. 308, 319, 96 L. Ed. 342, 350; 72 S. Ct. 388;

Federal Comm. Com. v. American Broad. Co., 347 U. S. 284, 296, 98 L. Ed. 699, 709, 74 S. Ct. 593.

Because the power purportedly delegated to appellee board includes the power to assess liens, the proceedings are *in invitum* and must be pursued strictly according to law. The ordinance provides for a description of the "*particular*" land upon which the challenged building stands (App. C. § 96.119 (b)). The board must so describe the land in its notices.

"Positive legislative enactments prescribing conditions essential to the existence and preservation of a statutory lien cannot be disregarded."

United States v. Beaver Run Coal Co., 99 F. 2d 610, 612-613;

To like effect:

Ketterer v. United States Fidelity & Guaranty Co., 84 F. 2d 736, 738;

Smith v. Anderson Bros. Corp., 104 Fed. Supp. 117, 119.

The law of the State of California requires that a notice of proceedings which may culminate in the assessment of a lien must specify the property concerned, and, in abatement proceedings, describe each lot concerned, although such lots are contiguous. Collective assessments and descriptions are not valid.

Dehail v. Morford, 95 Cal. 457, 459; 30 Pac. 593, 594;

Brooks v. City of Oakland, 160 Cal. 423, 428, 430, 117 Pac. 433, 434, 436;

Southwick v. Santa Barbara, 158 Cal. 14, 19, 22, 109 Pac. 610, 613.

The separate treatment of each building and the land on which it stands is required in nuisance abatement proceedings.

Newton v. Town of Highland Park, 282 S. W. 2d 266, 277 (C. C. A., Tex. 1955).

But the above quoted proposition of the District Court of Appeal is basically untenable because it would limit judicial protection of constitutional rights to persons and property shown to be legally blameless. Constitutional

rights are not so limited. Guilt or innocence of the accused is irrelevant to the issue of whether his constitutional right of freedom from oppressive exercise of police power has been invaded.

McFarland v. American Sugar Ref. Co., 241 U. S. 79, 85, 60 L. Ed. 899, 904, 36 S. Ct. 498;

Shields v. Utah, Idaho C. R. Co., 305 U. S. 177, 183, 83 L. Ed. 111, 116, 59 S. Ct. 160;

Rochin v. California, 342 U. S. 165, 174, 96 L. Ed. 183, 191, 72 S. Ct. 205.

The California District Court of Appeal, in this respect, has confused the instant case with cases such as *Armstead v. City of Los Angeles*, 152 Cal. App. 2d 319, 313 P. 2d 127 and *Stoetzner v. City of Los Angeles*, 170 A. C. A. 485, 338 P. 2d 971, in which the property owner seeks judicial review of *completed* administrative action. In such cases it is essential to aver the facts which make the challenged administrative order untenable. But in the instant case no purpose would be served by such averments. The issue here is unlawfulness of the tribunal and its procedure, not of its product.

3. The Ordinance Denies Appellants Equal Protection of the Laws.

The standards prescribed in Sections 96.100 to 96.128 (App. C) of the challenged ordinance unjustly discriminate against owners of buildings subjected to proceedings under the ordinance as distinguished from owners of buildings not so subjected. The ordinance requires that buildings subjected to proceedings thereunder be more stable and strong than other buildings. This is manifest upon a comparison of Section 91.0103, applying to buildings in general, which allows stresses up to *twice* the

working stresses permitted by the building code [R. p. 42, line 17], and Section 96.101.3, applying to buildings subjected to the challenged ordinance which allows *only one-and-a-half times* the working stresses permitted by the building code. [R. p. 51, lines 22-26.]

Such arbitrary discrimination is condemned by this court as a denial of equal protection of the laws.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 559-564, 46 L. Ed. 679, 689-692, 22 S. Ct. 431;

Gulf C. & S. R. R. Co. v. Ellis, 165 U. S. 150, 165-166, 41 L. Ed. 666, 668, 670, 672, 17 S. Ct. 255.

The same discrimination exists in Sections 96.101 (a) (10) (App. C.) proclaiming a building to be a nuisance if 33% damaged structurally or 50% damaged in non-supporting members; and in Section 96.101 (a) (13) (App. C.) proclaiming a building to be a nuisance if any supporting member has less than 66% of the strength or fire resistive qualities of structural members of a new building under the present building code. When these subsections are compared with Section 91.0103, which prescribes the "two-times" stress rule applicable to buildings not subjected to formal proceedings, it is apparent that a building subjected to the ordinance here challenged may be doomed to oblivion without offending the Section 91.0103 standard that applies to all other buildings.

Section 96.106 casts the burden of proof upon a property owner to "show cause why a building should not be demolished." This reverses the rule of judicial proceedings that the moving agency must carry the burden of proof. It is especially unfair in that the proceedings may result in criminal sanctions.

In *City of Houston v. Lurie*, 148 Tex. 391, 224 S. W. 2d 871, 14 A. L. R. 2d 61, at pp. 67-68, the court stated:

"In *City of Texarkana v. Reagan*, 112 Tex. 317, 322, 323, 247 S. W. 816, 817, the court said:

"'*Whether or not the building here in controversy was in fact a nuisance is to be established by legal and competent evidence, in the same manner as any other fact, and the burden is upon the city to do this.*' (Emphasis added.)"

To like effect:

Morrison v. California, 291 U. S. 82, 88-89, 93-94, 781 L. Ed. 664, 669, 672-673, 54 S. Ct. 281;

Pacific Portland Cement Co. v. Food Machinery etc., Co., 178 Fed. 541, 547.

By inspection, respondents should be as familiar with the facts as appellants. Putting the burden on appellants reverses the usual notion of fair play, particularly in a proceeding that is *in invitum* and carries criminal penalties.

Appellants allege that the ordinance denies them equal protection of the laws, both on its face and as administered by appellees. Appellants are entitled to present their evidence to a trial court to establish the truth of these averments and the truth of the averment that appellees persist in their unlawful and unconstitutional denial of equal protection. Unconstitutional administration of an ordinance is as offensive to constitutional limitations as if it were unconstitutional on its face.

Lane v. Wilson, 307 U. S. 208, 275-276, 83 L. Ed. 1281, 1287-1288, 59 S. Ct. 808;

Yick Wo v. Hopkins, 118 U. S. 356, 374, 30 L. Ed. 220, 227, 6 S. Ct. 1064.

The standards and mode of procedure prescribed by the challenged ordinance amount to an unlawful declaration that buildings shall be demolishable public nuisances without regard to the safety of the public in fact.

This issue was raised in the complaint as amended [R. p. 53 line 15, to p. 55 line 6; p. 59, lines 1-19; p. 69; lines 7-30; p. 70, lines 21-30]. It was extensively argued in the court below. It was not mentioned in the opinion of the California District Court of Appeal.

Summary.

The municipalities of the United States are becoming more aware of a need and desire to modernize the aging and deteriorated areas of cities. This trend is apparent in the increasing use of urban renewal plans, ordinances and statutes to effectuate such plans, and in the modernization of building codes.

Berman v. Parker, 348 U. S. 26, 99 L. Ed. 27, 75 S. Ct. 98;

Redevelopment Agency v. Hayes, 122 Cal. App. 2d 777, 266 P. 2d 105;

Cert. den. sub. nom. Van Hoff v. Redevelopment Agency, 348 U. S. 897, 99 L. Ed. 705, 75 S. Ct. 214;

Housing Act of 1949, Title 1, P. L. 171, 81st Congress, 42 U. S. C. A. Sections 1441-1460;

Annotation: 44 A. L. R. 2d 1414, 1417-1420.

As in the cause at bar, some municipal governments inevitably will attempt to accomplish these laudable ends by the less expensive method of confiscation instead of eminent domain on the premise that the end justifies the means regardless of constitutional impediments. The rela-

tively unlimited financial means of large cities and the powerful presumptions that support their exercise of police power, make this Court the only sure refuge of property owners whose constitutional right to protection of their property is lost sight of in these municipal modernization programs:

> ". . . The courts in recognizing the urgent need for community planning in a modern society have effectively 'stacked the deck' of procedural law against the non-conforming user. The owner must seek relief from a reviewing commission which by its nature and composition will quite likely be unsympathetic to his position. Failing there, he must appeal the commission's findings to a court where a presumption favors such findings. Or he can go directly to the courts and attack the validity of an ordinance which the courts will initially presume to be valid."
>
> "The Elimination of the Non-Conforming Use in California," Elvin Lawson Riddle, 8 Hastings Law Journal (Nov. 1956) 64, 68.

The constitutional questions presented in the cause at bar are of national importance and their solution requires a timely opinion by this Court not only for determination of the immediate controversy, but for the guidance of the municipal governments in the United States and the protection of property owners facing similar problems.

The warning of Justice Holmes, stated in *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393, 416, 67 L. Ed. 322, at p. 326, as follows, is particularly appropriate:

> "We are in danger of forgetting that a strong desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Wherefore, appellants respectfully submit that this cause is within the appellate jurisdiction of this Court and that the cause is of such nature as to be worthy of plenary consideration by this Court, and pray that the Court enter its order noting jurisdiction of the within cause.

Respectfully submitted,

JOHN W. HOLMES,

Attorney for Appellants.

APPENDIX A.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Gerald Dunitz, Morris Luskin, Elliot R. Fine, Jacob Albert, Bernard Fineman, Abner Parker, Sydney J. Dunitz, Sylvia Dunitz, Dorothy Brown and Shirley Glossman, co-partners, doing business under the name and style of Macy Industrial Realty Company, Plaintiffs and Appellants, vs. City of Los Angeles, a municipal corporation, Department of Building and Safety of the City of Los Angeles, an administrative agency of the City of Los Angeles, Board of Building and Safety Commissioners of the City of Los Angeles, an administrative agency of the City of Los Angeles, Sidney F. Hill, Louis Warschaw, Ernest C. Hillman, Jr., Herman Charles Light and F. L. Sebesta, as members of the Board of Building and Safety Commissioners of the City of Los Angeles and Gilbert E. Morris, Superintendent of Building of the City of Los Angeles, Defendants and Respondents. 2nd Civil No. 23490.

Filed; May 18, 1959.

Appeal from judgment of the Superior Court of Los Angeles County. Leon T. David, Judge. Affirmed.

For Appellants: Dunlap, Holmes, Ross & Woodson.

For Respondents: Roger Arnebergh, City Attorney, Bourke Jones, Assistant City Attorney and Marcus E. Crahan, Jr., Deputy City Attorney.

Plaintiffs appeal from a judgment dismissing the action entered after defendants' demurrer to the complaint as amended had been sustained without leave to amend.[1]

By their complaint plaintiffs sought to have the court declare "that Sections 91.0103, 96.101, 96.101.2, 96.112, 96.119 and 96.121 of the Los Angeles Municipal Code" as interpreted and applied by the defendants are invalid and unconstitutional and to have the court declare the proper meaning thereof and to enjoin the defendants from prosecuting certain proceedings against the property of the plaintiffs otherwise than in conformity with the meaning and interpretation given to the said code sections of the Municipal Code by the court.

We have reached the conclusion that the lower court properly exercised its discretion under section 1061 of the Code of Civil Procedure in sustaining the demurrer and thereby denying the plaintiffs declaratory relief. Whether declaratory relief should be granted is a matter within the trial court's discretion and its denial of that remedy will not be disturbed on appeal unless it is clearly shown that the discretion was abused. (Hannula v. Hacienda Homes, 34 Cal. 2d 442, 448; California Physicians' Service v. Garrison, 28 Cal. 2d 790, 801; Moss v. Moss, 20 Cal. 2d 640.)

By the complaint as amended plaintiffs allege in substance that they are the owners of approximately 12¼ acres of land situate in the manufacturing district of the city of Los Angeles and that there are approximately 30 buildings of various ages and types of construction situate thereon; that this property had a value in excess

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[1]Appellants make no contention that the court abused its discretion in denying them leave to amend and to the contrary waive any such grounds for reversal.

of one million dollars. That prior to the commencement of this action they received notices from the Department of Building and Safety of the defendant city that the building inspectors of the city had filed with the Board of Building and Safety Commissioners of the city of Los Angeles reports as to the condition of said buildings and that the board had determined that there was probable cause to believe that each of the buildings and structures described in the notices was a "dangerous" building and ordered plaintiffs to show cause before the board at a time fixed in the notice, why said buildings or structures "should not be condemned as a public nuisance and said nuisance be abated by reconstructing or properly repairing said building or by razing or removing same." That as to three of the buildings they have received notices which conclude as follows:

"Whereas the above-enumerated dangerous and hazardous conditions exist in these buildings to such an extent that these are dangerous buildings and it is impossible to repair these buildings so that they will no longer exist as dangerous buildings and as nuisances without reconstructing them; and, THEREFORE, a hearing has been set before the Board of Building and Safety Commissioners to determine whether or not an order should be issued to vacate and demolish said buildings."

While it is alleged in the complaint that in the notices served upon appellants, 340 deficiencies in the buildings are specified, the complaint does not allege what the nature or character of the deficiencies specified in the notices are and it is impossible to determine whether the deficiencies claimed are due to deterioration of the buildings as erected or due to the failure of said buildings to comply with the existing building code or are deficiencies which create fire or health hazards and public nuisances in fact.

The complaint further alleges that during the two years last past the defendants have pursued a program known as a "rehabilitation survey" and have instituted proceedings "against owners of buildings that could not be presently constructed under existing law of the kind of materials and embodying certain features of design that are characteristic of older type buildings" and in said proceedings have required owners "to defend their said buildings against the claim by defendants that the same are 'nuisances,' as defined in said Sections 96.101 to 96.128. (of the Municipal Code) because they are built of such materials and embody such features of design that they do not and cannot, without virtual reconstruction, be made to comply with the law now regulating the construction of new buildings in the same location." That in many of the proceedings the property owners have been ordered by the defendants to demolish the existing buildings upon the grounds above stated; that the proceedings pursued by the defendants in the present case follow the same pattern as initiated by the defendants against other property owners; that the 18 cases in which demolition had been ordered the superior court had granted peremptory writs of mandate annulling orders for demolition.

The complaint further alleges that in order to defend the proceedings before the board it would be necessary for plaintiffs to expend not less than the sum of $25,000. The complaint then alleges that numerous controversies exist between plaintiffs and defendants in relation to the meaning and application of the sections of the Municipal Code first above mentioned.

It would unduly prolong this opinion and serve no useful purpose to state in detail the controversies that are

alleged to exist between the parties. Suffice it to say that none of them states a present existing controversy based upon facts alleged to exist in the present proceedings to which any declaratory decree could be addressed. This is so because it cannot be determined from the complaint what the nature or character of the deficiencies in the plaintiffs' buildings are asserted to be and it cannot therefore be determined whether the plaintiffs will be adversely affected by the numerous sections of the ordinance here attacked, in the proceedings commenced by the defendants. What the plaintiffs seek in this action is not a declaration of their rights under the ordinance as applied to be a definite factual situation but is an advisory opinion from the court as to the validity and meaning of the numerous sections of the code attacked. For example, it is alleged that the defendants contend that some of the buildings situated upon the plaintiffs' property are dangerous as that term is defined in section 96.101 and are, therefore, nuisances under section 96.101.2 of the Municipal Code, and that because certain of the materials of construction in said buildings and certain features of their design are such that they cannot without substantial reconstruction be made to conform to the standards required by existing law, said buildings may be ordered to be demolished at the expense of the plaintiffs and that said expense may be imposed by assessment as a lien against the property of the plaintiffs and that the defendants construe sections 91.0103 and 96.101-128 as authorizing retrospective application of the present building code to buildings erected prior to the enactment of that code, while the plaintiffs contend that the ordinance cannot declare buildings to be a nuisance because the material or features of design may not comply with the present building code regulating the construction of new

buildings and that the ordinance cannot declare that to be a nuisance which is not in fact a nuisance. Yet there is no showing that the defendants in the present proceedings assert deficiencies in plaintiffs' buildings because the material of which they are constructed or their design does not comply with the present building code regulating the construction of new buildings in the same district or seek the demolition of plaintiffs' buildings because of such conditions. We cannot assume that the defendants will, in the pending proceedings, attempt to order the demolition of plaintiffs' buildings without first proving by competent evidence that plaintiffs' buildings are nuisances in fact which cannot from a practical standpoint be remedied by alteration or repair. We must assume that the defendants will not ignore the judgment of this court as set forth in Armistead v. City of Los Angeles, 152 Cal. App. 2d 319.

The defendant city has the power through its administrative agency to abate nuisances and within constitutional limits to force property owners to abate conditions which in fact constitute nuisances or hazards to the public health or safety and neither this court nor could the trial court assume that in the present proceedings the defendants will attempt to exercise the police power of the city beyond its constitutional limits. If they should do so the plaintiffs have an adequate remedy under section 1094.5 of the Code of Civil Procedure and if in such proceedings the decision should be adverse to them, by appeal from such decision.

The trial court properly refused to undertake by declaratory judgment[2] to define in the abstract the mean-

[2]The extended and erudite opinion filed by the trial court does not constitute such a judgment.

ing of the numerous provisions of the ordinance under consideration or the constitutionality of their application by the defendants. (Monahan v. Dept. of Water & Power, 48 Cal. App. 2d 746; Conroy v. Civil Service Commission, 75 Cal. App 2d 450, 456.) To do so would amount to an attempt by the court to, through its decision, amend the ordinance under the guise of interpretation and lay down rules which would govern the local administrative body, not alone as to the present litigants but as to all similar matters.

The judgment is affirmed.

NOURSE, *J. pro tempore*

We concur:

WHITE, *P. J.*

FOURT, *J.*

APPENDIX B.

Opinion and Order Upon General Demurrer.

In the Superior Court of the State of California, in and for the County of Los Angeles.

Gerald Dunitz, *et al.*, etc., Plaintiffs, vs. City of Los Angeles, a municipal corporation, *et al*, Defendants. Civil No. 693056.

Filed; May 2, 1958.

I.

The complaint and amendment thereto request declaratory relief in respect to Los Angeles Municipal Code sections 91.0103 and 96.100-96.128 as amended to date (hereinafter cited as LAMC) claiming them to be unconstitutional; and seek to enjoin a pending proceeding before the Board of Building and Safety Commissioners of the City of Los Angeles, pursuant to such ordinance sections.

The complaint as amended alleges that plaintiffs own 12¼ acres improved by 30 buildings constructed at various times within the last 40 years, of various types of construction. Pursuant to inspections and reports made by defendants under LAMC sections 96.100 to 96.128, plaintiffs have been cited by various notices to appear before the Board of the Department of Building and Safety to determine whether or not some 340 reported violations of the building laws in such buildings must be remedied. (Complaint par. XIII). The allged violations are not described in the complaint nor the amendment thereto. The ordinance provides for determination of this matter by written findings and order after hearing. If remediable conditions then found to violate the city ordinance are not repaired by the owner, the city may perform the work

and lien the property for the cost thereof. If the Board determines, after hearing, that the entire building is dangerous, and beyond the limits of repair established by the ordinance, the owner can be ordered to demolish it. Upon his failure to act, the city may do the work and make the cost a lien against the property. Such administrative determinations are, of course, subject to court review (C. C. P. sec. 1094.5; see Armistead v. City of Los Angeles (1957), 152 Cal. App. 2d 319). The procedure to establish the assessment and lien for doing the work involves a further proceeding before the city council, and any foreclosure of the lien is accomplished by court action. (LAMC sec. 96.121). It is alleged that the land upon which the buildings are located was not described in the notice of hearing except by street address and a deed recordation reference, and that the buildings listed on the inspection reports include two not located on the land so described. It is asserted that the [other 30] buildings are located on plaintiffs' land, occupying not more than 25% of the entire area of the parcel; that some buildings have common walls and that others are separate from each other. The plaintiffs have demanded that new notices be given, describing each building separately, on separate land parcels for which descriptions could be devised, but such request was not granted. The hearings, set and continued by various notices, are still in abeyance *pendente lite*. It is asserted that to appear in the hearings and to defend will cost plaintiffs $25,000; and that to remedy deficiencies or to make repairs would be costly; and that the cost thereof, if placed as a lien on the property would render it unmarketable and valueless as loan collateral; that the payment of such charges would be a burden without benefit. Plaintiffs do not assert that such violations do not exist in fact. If they do

not exist in fact, there is no justiciable controversy which can be made the subject of declaratory relief or injunctive relief. If they do exist in fact, as the complaint infers, and if plaintiffs' allegations as to certain provisions of the ordinance in question support the inference that such deficiencies fall within such provisions, no cause of action is stated. In all unspecified details, the presumption is that official duty has been regularly performed. In relation to specific provisions of the ordinance, the allegations that action thereunder is and will be arbitrary, unreasonable, etc., are not supported by other facts and the allegations are legal conclusions, upon which a cause of action may not be maintained. (Roberts v. Roberts (1947), 81 Cal. App. 2d 871, 886, 887; Miles v. McFarlane (1930), 104 Cal. App. 513, 519). Nor can it be otherwise, since the defendants at this stage are alleged to have done nothing but to notify the plaintiffs of claimed deficiencies, and to set a date when the matter will be heard. In paragraph XV as amended, the LAMC sections are picked to pieces, and it is asserted that a controversy exists between the parties as to their interpretation and validity in specified particulars. Generally speaking, this is a mere speculative debate at this stage of the proceeding. In the absence of allegation of the facts to which LAMC sections will apply, there is no actual controversy before us. Furthermore, until the hearing is held, and the facts are determined and orders, if any are made, such controversies will not arise, and this court by declaratory relief or otherwise cannot anticipate them.

The basic assertions are that the ordinance is itself invalid, void and unreasonable, and denies the equal protection of the laws, and due process of law, if and when applied to plaintiffs' buildings, and that judicial powers are

unlawfully conferred on the defendant Board. Abatement of premises for nonconformity to building code standards is not new to California law, as the following cases will show: (People v. Ryan (1936), 17 Cal. App. 2d 1; *cf.* Contra Costa County v. Cowell Portland Cement Co. (1932), 126 Cal. App. 267, 271; People v. United Capital Corp. (1938), 26 Cal. App. 2d 297; People ex rel. Dept. Ind. Rel. v. Morehouse (1946), 74 Cal. App. 2d 870; People v. Foerst (1935), 10 Cal. App. 2d 274; Baird v. Bradley (1952), 109 Cal. App. 2d 365; People v. Oliver (1948), 86 Cal. App. 2d 885, 888).

There is a strong presumption of validity of the ordinance. (Miller v. Board of Public Works (1925), 195 Cal. 477, error dis. 273 U. S. 781, 38 A. L. R. 1479). Upon this demurrer, we look, therefore, to the ordinance on its face.

In Stevenson v. Colgan (1891), 91 Cal. 649, at page 652 it is said: "While the courts have undoubted power to declare a statute invalid, when it appears to them in the course of judicial action to be in conflict with the constitution, yet they can only do so when the question arises as a pure question of law, unmixed with matters of fact the existence of which must be determined upon a trial, and as the result of it, it may be, conflicting evidence. . . . We therefore hold, that in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice."

The court will not substitute its judgment for that of the city council, nor can its determinations be set aside unless clearly and palpably wrong. (Lockard v. City of Los Angeles (1949), 33 Cal. 2d 453, 461).

All doubts are resolved in favor of constitutionality, (Shealor v. City of Lodi (1944), 23 Cal. 2d 647; Mansur v. City of Sacramento (1940), 39 Cal. App. 2d 426) and it will not be inquired into as an abstract or hypothetical question, (Lord v. Ingels (1944), 64 Cal. App. 2d 559; People v. Black (1941), 45 Cal. App. 2d 87, app. dis. Black v. State of California, 315 U. S. 782; In re Davis (1936), 18 Cal. App. 2d 291; Corp. of Presiding Bishop v. City of Porterville (1949), 90 Cal. App. 2d 656, app. dis. 338 U. S. 805, rehearing denied 338 U. S. 939). There must be palpable and irreconcilable conflict, (In re Porterfield (1946), 28 Cal. 2d 91; People v. St. John (1930), 108 Cal. App. Supp. 779; Miller v. Municipal Court (1943), 22 Cal. 2d 818), and if more than one interpretation is possible, that which will render the ordinance constitutional is to be adopted. (Edwards v. City of Los Angeles (1941), 48 Cal. App. 2d 62; People v. Smith (1939), 36 Cal. App. 2d Supp. 748; People v. Steel (1939), 35 Cal. App. 2d Supp. 748).

If reasonable minds might differ, the enactment will be upheld, (Justesen's Food Stores v. City of Tulare (1941), 43 Cal. App. 2d 616; Ex parte Ruppe (1927), 80 Cal. App. 629).

II.

The City of Los Angeles is organized under California constitution Art. XI secs. 6 and 8, and as such "may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations" of its charter "and in respect to other matters they shall be subject to general laws". In addition, by virtue of California Constitution Art. XI sec. 11, Los Angeles along with all other cities, "may make and enforce within its

limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

The charter (published in Cal. Stats. 1925 p. 1024 and amended to date) in sec. 2(4) and (6) accepts the constitutional grants of power. Its exercise of police power under art. XI sec. 6 and 8 is correlative and superior to that of the state legislature in municipal affairs.

Such municipal powers, like those of the legislature, need not be enumerated, the charter, like the state constitution, operates as a limitation and not a grant of power. (Stege v. City of Richmond (1924), 194 Cal. 305).

Under Art. XI sec. 11, the police power of the city is not limited by the charter, (In re Montgomery (1912), 163 Cal. 457), and the municipality has the right to exercise the whole police power of the state, so far as local regulations are concerned, unless such regulations conflict with general laws. (Jardine v. City of Pasadena (1926), 199 Cal. 64).

Specific Charter provisions state: Art. I, sec. 2(11): "Among the rights and powers which may be exercised by the City of Los Angeles, are the following, this enumeration being a partial enumeration and in no sense a restriction or limitation upon the rights and powers of the city:

"(a) to enforce law and promote the public peace, health, safety and welfare; . . . (f) to levy, collect and enforce special assessments for public or local improvements, or work, and, in the discretion of the city, to contribute from city funds towards the cost of the same; . . . (n) to regulate the construction, maintenance, and use of buildings; . . . (p) to establish . . . procedures, procedure ordinances . . . or other

instrumentalities for municipal government and for carrying out the powers conferred by this charter, not in conflict with the provisions of this charter, and any such procedure ordinance shall be additional or alternative to any procedure established by state law; . . ."

Sec. 35: "Except as otherwise in this charter specifically provided, the Council shall have full power to pass ordinances upon any subject of municipal control, or to carry into effect any of the powers of the city." (Cf. Raventtino v. City of San Diego (1945), 70 Cal. App. 2d 37, 47).

By L. A. charter sec. 70, a Building and Safety Department is established, under a board of five commissioners. By sec. 89, under such procedure as the Council prescribes by ordinance, each Board is permitted to appoint trial examiners when under the charter or any law "a right of appeal or protest to such Board is given; or where it is required to conduct any investigation or hearing;" and a Board "may adopt, reject or modify the report of any examiner in whole or in part. . . ."

Charter sec. 90 states in part: "The Department of Building and Safety shall have the power and duty to enforce all ordinances and laws relating to the construction, alternation, repair, and demolition, or removal of buildings or structures in the city, and to the installation, alteration, repair, use, and operation of all heating, plumbing, lighting, ventilating, refrigerating, electrical and mechanical appliances and equipment therein . . ." and sec. 93, "The Board of Building and Safety Commissioners shall have the power to make slight modifications for individual cases in the provisions of the building ordinances of the city. . . ."

On the subjects to which it pertains, the charter is a law of the state (C. J. Kubach Co. v. McGuire (1926), 199 Cal. 215, 248 Pac. 676; In re Pfahler (1906), 150 Cal. 71, 88 Pac. 270; Brougher v. Board of Public Works (1928), 205 Cal. 426, 271 Pac. 487).

No doubt is entertained that the regulation of building structures within the city in the interest of public health, welfare and safety is of such primary importance to the community concerned that it is a municipal affair. (Brougher v. Board of Public Works, supra (1928), 205 Cal. 426; Lima v. Woodruff (1930), 107 Cal. App. 285). The only contrary authority was prior to the constitutional grant in 1914. (May v. Craig (1910), 13 Cal. App. 368). But "assuming that the regulation of private buildings in a municipality is not a municipal affair, it is not shown that the requirements . . . . contravene any general law of the state upon the subject." (Brougher v. Board of Public Works supra (1928), 205 Cal. 426, 437). Under the constitution Art. XI sec. 11, the city's police power is complete and self-executing. Government Code section 38860 and Health and Safety Codes secs. 15153, 15157 and secs. 17821-17829, do not confer power since the constitution does that, nor do they limit the constitutional power of Los Angeles to regulate buildings. (Cf. Simpson v. Los Angeles (1935), 4 Cal. 2d 60, 66).

The Los Angeles Municipal Code sections 96.100-96.120 inc. as amended to date are designed, states sec. 96.100, to "provide a just, equitable and practicable method, to be cumulative with and in addition to any other remedy available at law, whereby buildings or structures which are dilapidated, unsafe, dangerous or unsanitary, or are a menace to the life, limb, health, morals, property, safety and general welfare of the people of the City, or which

tend to constitute a fire hazard, may be required to be repaired, vacated or demolished."

Sec. 96.101 defines "dangerous building" in the terms of structures which exhibit any or all [*a fortiori*, any combination] of sixteen categories of physical impairments of buildings.

Sec. 96.102 provides for inspection to determine, *prima facie*, the condition of any building, followed by a report (sec. 96.104); for a hearing if probable cause is revealed by such reports (sec. 96.105); for notice (sec. 96.106) and hearing (sec. 96.107-96.111). The Board of Building and Safety Commissioners is to "hear and consider any evidence offered by the owners, occupant, or person in charge . . . or other person having estate or interest in the building or structure, pertaining to the matter set forth in the report" (sec. 96.111) and thereafter to make written findings as to whether or not the building or structure in question is a "dangerous building."

Based upon the findings and standards for repair, etc. (sec. 96.112) the Board of Building and Safety Commissioners may close the proceedings or order that the "dangerous building" be repaired, vacated and repaired, or demolished (sec. 96.115).

If the parties liable fail to comply, the Board is empowered to cause the work to be done, and the cost may be assessed against the owner's property (sec. 96.121), through a further proceeding and hearing before the City Council, subject to protests and objections; the City Council can revise, modify, or correct the report and lien proceedings; the lien being recorded on the city records, and foreclosed by court action; (sec. 96.121j) in the event of non-payment. The ordinance carries a severability and

separability clause if any of its provisions are found unconstitutional.

III.

1. The doctrine of separation of powers does not prevail in local government. The Board of Building and Safety Commissioners does not invalidly exercise judicial powers. (Skinner v. Coy (1939), 13 Cal. 2d 407, 419-420; Los Angeles County v. Spencer (1899), 126 Cal. 670).

2. There is no constitutional bar to applying a presently established requirement to an existing building. To hold otherwise would prevent all legislation designed to remedy deleterious conditions, however and whenever created. (Hadacheck v. Sebastian (1918), 239 U. S. 394; Ex parte Hadacheck (1913), 165 Cal. 416; Queenside Hills Realty Co. v. Saxl (1946), 328 U. S. 80, 66 S. Ct. 850, property owner compelled to conform to new requirements; Miller v. Board of Public Works, supra (1925), 195 Cal. 477, 488).

3. While sec. 96.101.2 declares that all "dangerous buildings" are declared to be public nuisances, plaintiffs' basic legal error in the complaint is the assumption that nuisances cannot be declared by a chartered city, except under Civil Code secs. 3479-3480, 3491, 3494, and that no remedies may be invoked other than that of court action. The power of the city to legislate in this field, under the constitution, is as broad as that of the legislature itself. (Ex parte Roach (1894), 104 Cal. 272; Odd Fellows Cem. Assn. v. San Francisco (1903), 140 Cal. 226; Monterey Club v. Superior Court (1941), 48 Cal. App. 2d 131, 147) and is not restricted to suppression of those things which are nuisances per se within the meaning of Penal Code sec. 370, and Civil Code secs. 3479-3480

(People v. Johnson (1954), 129 Cal. App. 2d 1; Laurel Hill Cemetery v. City & County of San Francisco (1907), 152 Cal. 464). Such powers, we repeat, are not limited to such things already declared nuisances or which have been declared such by a court. (Boyd v. Sierra Madre (1919), 41 Cal. App. 520, 522) but extend to everything expedient for the preservation of the safety, health or comfort of the city's inhabitants. The police power is broader than nuisance suppression. (Clemons v. City of Los Angeles (1950), 36 Cal. 2d 95, 103-104).

4. While the City Council cannot delegate its power to make a law, or ordinance, it can delegate the power to the Board of Building and Safety Commissioners to determine the facts upon which the ordinance in question makes or intends to make its own action depend, (Gould v. Western Dairy Products, Inc. (1936), 12 Cal. App. 2d 188, 191; Wheeler v. Gregg (1949), 90 Cal. App. 2d 348, 363; 370; Carter v. Stevens (1930), 211 Cal. 281; Ex parte Fiske (1887), 72 Cal. 125; Agnew v. City of Culver City (1956), 147 Cal. App. 2d 144, 158) even though the delegated power itself involves a discretion or the necessity of determining terms, qualifications or conditions under which the Board may act, within the scope of the general power. (Leftridge v. City of Sacramento (1943), 59 Cal. App. 2d 516, 523).

5. The police power extends to conditions which are dangerous or injurious, whether or not they are termed nuisances, and is not limited, as plaintiffs contend, to the common law definition of nuisance. (In re Junqua (1909), 10 Cal. App. 602, 605; Laurel Hil Cemetery v. City & County of San Francisco, supra (1907), 152 Cal. 464, 474). In City of Los Angeles v. Gage (1954), 127 Cal. App. 2d 442, 451, it is stated that the police power is not

restricted to the suppression of nuisances but "includes the regulation of the use of property to the end that the public health, morals, safety, and general welfare may not be impaired or endangered." The mere fact that LAMC sec. 96.101.2 brands the proscribed conditions as nuisances doesn't invalidate the ordinance where there is power to regulate or prohibit the conditions so labeled, (In re Mathews (1923), 191 Cal. 35, 39). In the form of the order for removal of such conditions, whether such conditions are labelled nuisances or not is immaterial (Vanderhurst v. Tholcke (1896), 113 Cal. 147, 152).

IV.

1. The standards by which the Board is to proceed are generally adequate. The standard in Gaylord v. City of Pasadena (1917), 175 Cal. 433, was no more than that the administrative officer was to determine when electrical installations were "dangerous to life and property" upon which the property owners was compelled to make repairs within ten days. If such a general standard is valid, one fails to see how the elaborations of the Los Angeles ordinance are less so. The delegations of power to make factual determinations are adequate and valid. (Compare: Larsen v. City and County of San Francisco (1957), 152 Cal. App. 2d 355, 361, 313 Pac. 2d 959; Carter v. Stevens, supra (1930), 211 Cal. 281; In re Flaherty (1895), 105 Cal. 558; Agnew v. City of Culver City, supra (1956), 147 Cal. App. 2d 144, 158, 304 Pac. 2d 788; Ex parte Fiske, supra (1887), 72 Cal. 125; Gould v. Western Dairy Products, supra (1936), 12 Cal. App. 2d 188; Ray v. Parker (1940), 15 Cal. 2d 275, 285; Jersey Maid Milk Products Co. v. Brock (1939), 13 Cal. 2d 620, 642; Red "C" Oil Mfg. Co. v. Board of Agriculture (1911), 222 U. S. 381, 56 L. ed. 240, where illumi-

nating oils were to be "pure, safe and to afford a satisfactory light").

We are not concerned here with regulations based upon general standards, but with the general standards themselves which are enforced as such by the administrative body, a much stronger case. Within the powers delegated, the definition of terms and of qualifications and conditions is validly vested in the Board in the first instance. (Leftridge v. City of Sacramento, supra (1943), 59 Cal. App. 2d 516, 523, and cases cited).

2. "The essential requirement of due process is met when the administrative body is required to determine the existence or non-existence of the necessary facts before any decision is made. Such a descretion is not so arbitrary or so unguided as to invalidate the statute or ordinance." (Wheeler v. Gregg, supra (1949), 90 Cal. App. 2d 348, 362; Mitchell v. Morris (1949), 94 Cal. App. 2d 446, 450). The burdens placed on property under the police power do not constitute a denial of due process of law. (Graham v. Kingwell (1933), 218 Cal. 658, 660).

3. Courts should let administrative boards work out their problems with as little interference as possible. (Ray v. Parker, supra (1940), 15 Cal. 2d 275, 311). An injunction will not issue against administrative officials proceeding under valid statutes. (Financial Indem. Co. v. Superior Court (1955), 45 Cal. 2d 395, 402) on the ground they may act unwisely or injuriously (Reclamation District v. Superior Court (1916), 171 Cal. 672, 682-683).

4. Despite plaintiffs' arguments, there is no presumption that the power or discretion of a city administrative board will be arbitrarily, wantonly, corruptly, or oppressively exercised. (Ex parte Fiske, supra (1887), 72 Cal.

125, 127; Roussey v. City of Burlingame (1950), 100 Cal. App. 2d 321, 325-326), but if from their action it later is made sufficiently to appear, "the courts will not hesitate to extend their protective aid to the parties so discriminated against" (City of Stockton v. Frisbie & Latta (1928), 93 Cal. App. 277, 296). "Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes of oppression and mischief." (In re Flaherty, supra (1895), 105 Cal. 558; In re Holmes (1921), 187 Cal. 640, 647).

5. Presumptively, the basic standards for new construction have been adopted because deemed justified by the requirements for public health, welfare and safety. As soon as a building is built its depreciation begins, and it is entirely reasonable that a legislative body should determine, as has been done in the code provisions in question, to what degree older buildings should be required to meet present standards. What is unobjectionable at first may later be regulated. (City of Los Angeles v. Gage, supra (1954), 127 Cal. App. 2d 442; 453); new construction or new installations may be required. (Queenside Hills Realty Co. v. Saxl, supra (1946), 328 U. S. 80, 66 S. Ct. 850); and existing uses may be forbidden altogether, (Hadacheck v. Sebastian, supra (1918), 239 U. S. 394, 36 S. Ct. 143, 60 L. ed. 348).

In setting standards the legislative determination of the necessary facts is presumed, and the courts have the duty to uphold the legislative power. (City of Los Angeles v. Gage, supra (1954), 127 Cal. App. 2d 442, 451; A court can only invalidate such an ordinance if no just relationship to the objects to be attained, and no rea-

sonable tendency to achieve them is generally disclosed. (In re Mathews, supra (1923), 191 Cal. 35; Coelho v. Truckell (1935), 9 Cal. App. 2d 47). Whether there is a necessity to restrict private rights primarily is for the City Council to determine. (Graham v. Kingwell, supra (1933), 218 Cal. 658, 659; Laurel Hill Cemetery v. City and County of San Francisco, supra, (1907), 152 Cal. 464, 471).

6. The lien procedures are valid, but no controversy now exists. Which, if any, buildings of plaintiffs would be concerned cannot now be disclosed. Whether or not a lien, hereinafter purportedly created might be invalid does not invalidate the ordinance nor the lien procedures. So far as we can determine, all of plaintiffs' parcel of land may validly be subjected to lien on account of work done in relation to any building upon it. An adequate remedy exists, in the fact that the City Council is to conduct a hearing on all matters of assessment (sec. 96.121) and foreclosure is provided in a regular court proceeding. An ordinance lien is valid (Raisch v. Myers (1946), 27 Cal. 2d 773, 167 Pac. 2d 198). The procedure conforms to due process, in providing for the aforesaid hearings, and ultimate judicial enforcement, and where several properties are on one parcel of land, an objection to the want of separate lien proceedings would not be valid. (Contra Costa County v. Cowell Portland Cement Co., supra (1932), 126 Cal. App. 267).

7. While the complaint and amendment allege citations for hearings concerning plaintiffs' property have been issued, based upon the inspections made, the particular deficieneies as to which plaintiffs are to answer have not been revealed in the complaint nor the amendment hereto. Before courts will interfere at this stage, the ordi-

nance, divorced from any factual application, would have to be found palpably unreasonable and incapable of proper application: We cannot say that of the ordinance provisions here in question. (Matter of Application of Miller (1912), 162 Cal. 687, 696). One must hold in favor of the ordinance, since its constitutionality is clear as against such general attacks. (Ex parte Shrader (1867), 33 Cal. 279).

8. The ordinance provides for a hearing before finding a "dangerous building" exists in any degree, a hearing before the City Council in relation to the lien, and for foreclosure of any lien in court. This is adequate for due process under both constitutions. (Sherer v. City of Laguna Beach (1936), 13 Cal. App. 2d 396, 57 Pac. 2d 157; Nider v. City Commission (1939), 36 Cal. App. 2d 14). The notice provisions of the ordinance are sufficient. (Drummey v. State Board of Funeral Directors (1939), 13 Cal. 2d 75), and in this case, plaintiffs concede notice.

V.

What has been said above disposes of most of plaintiffs' contentions. To be specific, certain additional holdings are here indicated, in relation to the numbered subsections of amended paragraph XV [page numbers refer to amendment to complaint].

Page 3. A. Example A: (B) (1) (a). LAMC sections 91.0103(1), (3) and section 96.101(a)2 are not in conflict since LAMC section 91.0102a provides that in case of conflict, the higher standard shall apply. A later enactment prevails over a conflicting prior enactment.

Page 4. B. Example B: This is answered under A. supra.

Page 5, par. 2, C. There is no requirement that structural safety be determined alone by use. (A billboard, for instance, may have no "use" by persons, and yet be unsafe.) There is no need for the Board to find anything other than the existence of conditions described in the ordinance, or the absence of them.

Page 5 (3), Example A: This is answered, by the general considerations, supra, including those re the "most restrictive" clause.

Page 6, Example B: The section itself gives the standard. It is not contended, so far as the complaint is concerned, there is any such damage here.

Page 6, (4): The *complete* test is neither uncertain nor arbitrary. Each person is also a member of the general public. The allegations are legal conclusions.

Page 7, (5): These sections are not necessarily inconsistent.

Page 7, (6): The allegations are captious.

Page 8, (7): This is answered by Gaylord v. Pasadena, supra, (1917), 175 Cal. 433.

Page 8, (8): To "list, lean or buckle" out of plumb imports abnormality, rather than planned legal construction of nonvertical surfaces, to which such terms in the ordinary use of the language do not apply. Obviously, there are circumstances to which the standard validly may apply without difficulty. Plaintiffs do not allege the features of their buildings complained of do or do not include such instances.

Page 9, (9): The wisdom of the standard is not to be judicially determined. Claimed safety in fact does not relieve property from police power regulations (Queenside Hills Realty v. Saxl, supra, 328 U. S. 80; In re Smith (1904), 143 Cal. 368).

Page 9, (10): Each of these situations described have been judicially recognized as elements justifying their abatement or repair, even to the extent of demolition in some cases.

Page 10, (11): The basic standards are set by the LAMC. The reporting procedure is valid under the California cases. The facts reported, not the report, determine the action. Cf. Ex parte Fiske, supra (1887), 72 Cal. 125; Barbier v. Connolly (1885), 113 U. S. 27.

Except in those well-established instances where abatement may be summary (Maguire v. Reardon (1921), 255 U. S. 271, affirming 41 Cal. App. 596), it seems intended that this is but one of several methods of initiating proceedings. It is not alleged such procedure was followed here.

Page 11, (12): This has been answered, in connection with the general propositions discussed, supra.

Page 12, (13): This is answered by In re Flaherty, supra (1895), 105 Cal. 558; Gaylord v. City of Pasadena, supra (1917), 175 Cal. 433. As in other cases, it must be remembered the ordinance in question provides for abatement, by orders concerning *use*, as well as those relating to structural conditions. Allegations that such ordinance provisions have no relation to public health, safety and welfare are legal conclusions, insufficient to challenge the ordinance itself, under the applicable presumptions. (Allen v. City of Los Angeles (1930), 210 Cal. 235, 239; Lockard v. City of Los Angeles supra (1949), 33 Cal. 2d 453).

Page 12, (14): The allegations are captious in view of the standards set for such purposes in the State Housing Act and LAMC. Lawfulness at time of construction is not the test.

Page 13, (15): While every building in a sense is a fire hazard to another situated near it, the section speaks of a "conditon" which by fair intendment may relate to something over normal hazard, or to facts such as those involved in Dunbar v. Alcalde (1850), 1 Cal. 355, and Surocco v. Geary (1853), 3 Cal. 69. The validity or invalidity will depend upon the physical facts to which this section is related. Plaintiffs plead none. LAMC 96.113 provides a standard. There is no prescriptive right to maintain a structure in status quo as against the police power and the ordinance in question. Finnegan v. Royal Realty Co. (1950), 35 Cal. 2d 409, 414, et seq.; McCloskey v. Kreling (1888), 76 Cal. 511; Ex parte Fiske, supra (1887), 72 Cal. 125; In re Newell (1906), 2 Cal. App. 767; Sullivan v. City of Los Angeles (1956), 116 Cal. App. 2d 807.

Page 14: 3. These contentions have been answered, supra.

Page 15: 4. Arbitrary or discriminatory enforcement is not presumed and the cited subsections are not the only ones concerned.

Page 16: 5. Same as 4, page 15.

Page 16: 6. The ordinance provisions are presumptively valid, and official duty is presumed to be validly performed. This is not a criminal proceeding. As an administrative proceeding, the Council has power to establish the procedure: Charter, sec. 2 (11)p. The fact that the reviewing court will apply the substantial evidence rule does not make the procedure illegal, but gives it validity; since however produced, the public authority's ultimate order must have such substantial evidentiary support in the record. (La Prade v. Dept. of Water and Power (1945), 27 Cal. 2d 47; Vaughn v. Board of Police Com-

missioners (1943), 59 Cal. App. 2d 771, app. dis. 321 U. S. 751).

Page 17, 7. The inspector's report pursuant to the requirements of the LAMC sec. 96.102-96.105 is *prima facie* evidence, (C. C. P. secs. 1920, 1926) provided it is the result of inspector's own observations. (Harrigan v. Chaperon (1953), 118 Cal. App. 2d 167), and it must be introduced as such at the hearing, as part of the evidence, (English v. City of Long Beach (1950), 35 Cal. 2d 155) and may be explained, tested or rebutted by the citee. (Peak v. Ind. Acc. Comm. (1947), 82 Cal. App. 2d 926).

In this connection, the citee clearly has the right to subpoena and examine those who made the report, if their testimony is not otherwise produced. Upon hearings before an examiner, the witnesses should be sworn and examined (Ordinance 95338, sec. 7; Charter sec. 89) (Nishkian v. City of Long Beach (1951), 103 Cal. App. 2d 749).

Page 17, 8. The board clearly has the power to make findings and act upon them. Consult, authorities cited supra.

Page 18, 9. The determination of what is *reasonable* is clearly within valid administrative delegation in the first instance. Whether by a *reasonable repair* the law can be met is a question validly delegated to the administrative body. "Reasonableness" is what from an objective common-sense view applied to the whole situation is not illegitimate in view of the end to be attained; (In re Hall (1920), 50 Cal. App. 786, 789-790); it means "fit and appropriate" (In re Flaherty, supra (1895), 105 Cal. 558), fair and suitable under the circumstances, which may involve all the criteria mentioned when the standard, i.e. compliance with the LAMC, is fixed.

LAMC sec. 91.1603(b) can be more restrictive as to buildings in the fire district; plaintiffs do not allege the applicability of either to any condition or their property.

Page 19, 10. If a dangerous building is 50% damaged, or decayed, or deteriorated, it shall be demolished; and as pointed out by plaintiffs, the code section of itself does not say whether this is 50% of a value, of cost, or of physical characteristics.

There is no reason to quarrel with the definition. It first of all relates to physical condition of the building; the terms used are "damaged, or decayed or deteriorated." This may be measured in terms of money required to restore such a condition to lawfulness. Conceding that the application of such a standard may require some administrative methodology does not invalidate the standard. In another instance, it has been said to relate to value (Armistead v. Los Angeles, supra (1957), 152 Cal. App. 2d 319, 323. Consult also: Baird v. Bradley, supra (1952), 109 Cal. App. 2d 365; A. H. Jacobson v. Commercial Union Assur. Co. (D. C. Minn. 1949), 83 F. Supp. 674).

Page 20, 11. Same as 9, page 18, above.

Page 20, 12. Where a building is erected or existing in violation of the law, and a fire hazard, it may be demolished legally. (Maguire v. Reardon, supra (1921), 255 U. S. 271, affirming 41 Cal. App. 596; cf. People v. Vasquez (1956), 144 Cal. App. 2d 575; People v. Oliver, supra (1948), 86 Cal. App. 2d 885; People v. United Capital Corp., supra (1938), 26 Cal. App. 2d 297). Hence, the section cannot be termed unconstitutional on its face, as plaintiffs contend.

Page 20, 13. Reference is made to 7, page 17, supra. While in Armistead v. City of Los Angeles, supra (1957),

152 Cal. App. 2d 319, 322, the court seems to regard such report as hearsay, the purpose of C. C. P. secs. 1920 and 1926, like the business-records statute generally (C. C. P. secs. 1953e-1953h) is to remove such records from the category of hearsay. When the foundation is established, they are *prima facie* evidence (cf. Nichols v. McCoy (1952), 38 Cal. 2d 447).

At least, such a report may serve as the complaint upon which the hearing proceeds (Walker v. City of San Gabriel (1942), 20 Cal. 2d 879, 881-882), and certainly may "be considered along with other evidence at the hearing" provided a proper foundation has been laid under C. C. P. 1920, 1926 or 1953e-1953h, or in any other recognized manner.

Page 21, 14. In view of the preceding discussions this objection is captious and untenable.

Page 21, 15. The section 96.115(c) cannot confer rights upon any of the named classes of persons that they do not possess; but the section validly recognizes that so far as the city is concerned, any of such persons may perform the obligations to repair or demolish "at his own risk." Objection (c) is untenable. The work so done is required by public authority. Those who conform are not, in our view of it, exercising public powers. Sec. 96.122 further defines sec. 96.115(c), in using the term "any person who holds any estate or interest."

Page 23, 16. The buildings concededly are in the territorial jurisdiction of the City and its agencies. Mail notices are consistent with constitutional right where the statute permits them. (Drummey v. State Board of Funeral Directors, supra (1939), 13 Cal. 2d 75, 80; C. C. P. sec. 1963(24).

Failure to comply with a final order may validly result in a penal proceeding. But the owner then may defend against it and claim any absence of knowledge or notice if that is a fact. This ordinance is constitutional in prescribing punishment and by reason of such further right to be heard on notice, does not deny due process of law. The power to make such violations a misdemeanor exists. (L. A. Charter, sec. 2(11) a, b, n; 2(6), 35; Government Code sec. 36900, 36901).

Page 23, 17. Sec. 96.119 is a procedure ancillary to enforcement of the lien rights created when those primarily liable for repair or demolition do not discharge their obligation. No opinion as to the construction or operation of this provision need be given now. There is no present threat to employ this section, and under the considerations reviewed, supra, only a hypothetical controversy exists.

Page 24, 18. This is not a valid objection, since the "established practices" like the "prevailing wage" are capable of administrative determination (City & County of San Francisco v. Boyd (1943), 22 Cal. 2d 685) in such instances where the specific provisions of the Los Angeles city charter do not govern the "established practices." (Charter, Art. IX; sec. 421, 425, 424, 432, etc.)

Page 24, 19. The power to create municipal liens and assessments for work done or benefits conferred (charter sec. 2(11)p; 35) (Raisch v. Myers, supra (1946), 27 Cal. 2d 773, would carry the power to fix finality of action for purposes of contest. There is no state statute on the subject matter and this is a local law authorized by Cal. Const. Art. XI sec. 11. A somewhat similar situation, claims provisions under Glendale ordinance, Slavin v. City of Glendale (1950), 97 Cal. App. 2d 407, 408; Klimper

v. City of Glendale (1950), 99 Cal. App. 2d 446, 452; Los Angeles charter sec. 2(11)(p).

Page 25, 20. Section 96.121(e) is governed by C. C. P. 961.

Page 25, 21. Same as 24. This is the law. Raisch v. Myers, supra (1945), 27 Cal. 2d 773; Diehl v. Hanrahan (1945), 68 Cal. App. 2d 32; Los Angeles charter, sec. 2(11)(p).

Page 25, 22. This is surplusage, since there is no personal liability for acts done under a valid statute agreeable to its requirements, permissions or authorization. As to any *ultra vires* acts, there is personal, but not corporate, liability. Cf. Healdsburg Electric Light & Power Co. v. City of Healdsburg (1907), 5 Cal. App. 558; Wolfsen v. Wheeler (1933), 130 Cal. App. 475; Proper v. Sutter Drainage District (1921), 53 Cal. App. 576; Boland v. Cecil (1944), 65 Cal. App. 2d Supp. 832; Gladstone v. Galton (C C A 9th 1944), 145 P. 2d 742; Downer v. Lent (1856), 6 Cal. 94; Holman v. Santa Cruz County (1949), 91 Cal. App. 2d 502; White v. Towers (1951), 37 Cal. 2d 727.

Page 26, 23. No reason is perceived how plaintiffs in the suit have any justiciable interest in the internal administration of the city. The city may, as between the officer and employee, make such a declaration. It concerns the power and duty of the City Attorney to defend such officer, agent or employee and does not purport to do more. Consult, Los Angeles charter sec. 42(2), (3) council control.

On plaintiffs' theory no litigant is prejudiced by such a provision. If the section acts as a ratification of the acts of the officers, agents and employees, it expands the litigant's remedy for any illegal action. If the official ac-

tion is legal, so that there is no liability against the city, there will be none against the officer, and *vice versa*. The rights against officials, etc., acting illegally are not cut down. (Cf. Fordney v. King County (1941), 9 Wash. 2d 546, 115 Pac. 2d 667; Merrill v. City of Wheaton (1942), 379 Ill. 504, 41 N. E. 2d 508; Greenwood v. City of Lincoln (1952), 156 Neb. 142, 55 N. W. 2d 343; Boyer v. Kanawha County Court (1922), 92 W. Va. 424, 114 S. E. 750).

The defense of suits does not of itself constitute ratification. (Butrick v. City of Lowell (1861), 83 Mass. (1 Allen) 172, 79 Am. Dec. 721).

Page 26, 24. The "unqualifiedness" of a civilian board or examiners to act as a quasi-judicial tribunal is a political, and not judicial question. The argument could be directed with equal validity to the jury system, or to a city council which holds many hearings. Plaintiffs' assertions are not geared with any allegations of fact concerning the personnel of the present Board with which plaintiffs are concerned. Qualifications have been passed upon by plaintiffs' representatives, the Mayor and City Council and their action is final and conclusive, not open to collateral attack in this proceeding. (Los Angeles Charter secs. 70, 40(4), as to Boards; sec. 89 as to examiners; Ord. 95338 sec. 3, examiners).

Page 27, l. 17-18. The "interested parties" mentioned are those other than the direct parties to the proceeding, who must be heard. (LAMC sec. 96.111; compare Exhibit 3 to amendment to complaint, Ord. 95338 sec. 5; sec. 6 where notice is to be given to "each party and interested person" and both are to be heard (idem, sec. 11).

Rules for the conduct of hearings are to be adopted by the Board (Ord. 95338, sec. 8a) but such applicable

rules are not pleaded. Sec. 11 requires consideration of the examiners' or committee's report by the Board, at a minimum, or consideration upon the record. When a trial examiner is employed, his report and proposed decision is akin to the report of a judge, court commissioner or special master. Objections may be taken to the report or to the proposed decision and any alternative decision may be proposed (idem sec. 10).

Plaintiffs contend their constitutional rights are violated because neither the ordinance, statute, or regulation "requires any member of the Board to read the transcript, or review the evidence . . . if the Board adopts the recommendation of the examiner as the decision of the Board."

As an abstract proposition, as it is at present, the objection urged by plaintiff has been held unmeritorious in relation to parallel state statutes. (Cooper v. State Board of Medical Examiners (1950), 35 Cal. 2d 242, 245, approving Hohreiter v. Garrison (1947), 81 Cal. App. 2d 384, 399-401; Leeds v. Gray (1952), 109 Cal. App. 2d 874, 879-885; Bess v. Park (1956), 144 Cal. App. 2d 798, 807).

Where a hearing examiner is employed he in effect is the trial judge. He must hear and consider all the evidence. Unless exceptions are taken to his findings and proposed decision, there is no controversy.

When they are taken, the hearing before the Board is directed to those issues framed by the objections. As to these matters, they are constrained to receive, hear and consider the evidence, if any presented. When a final conclusion is reached the Board's findings still must be supported by the evidence. (Nardoni v. McConnell (1957), 48 Cal. 2d 500, 503; Rogers v. Retirement Board

(1952), 109 Cal. App. 2d 751, 757; Smith v. Downey (1952), 109 Cal. App. 2d 745, 750).

Pages 28-29, 25. No constitutional rights are prejudiced.

(1) As a matter of notice, this paragraph demonstrates plaintiffs' full knowledge of the scope and extent of the inquiry in these proceedings.

(2) Since the structures are identified, the exact land on which each is situated is *ipso facto* identified (C. C. sec. 3538).

(3) Where every structure is upon an identified single parcel of land in one ownership no constitutional or other legal problem is involved.

(4) There is no requirement that the physical limits of each precise portion of a larger parcel of plaintiffs' property upon which each particular building is physically situated be described in institution of a proceeding. (LAMC sec. 91.106).

(5) There is no reasonable doubt that defendants are proceeding against every building in which there is alleged to exist some condition in violation of law.

(6) No rights of plaintiff are now violated, to be protected by injunctive relief, nor is there any actual controversy in respect to liens against plaintiffs' property.

(a) The proceeding, when concluded, may result in no action being required of plaintiffs.

(b) When the results of the proceedings are final, plaintiffs in the first instance have the right and duty to do any necessary work ordered. If their duty is performed, no lien will ever arise. It is no ground for injunctive relief to assert that "we may elect not to do our duty" and hence "we are entitled to enjoin defendants from performing theirs" on the ground that the resulting charge may be imposed upon plaintiffs' prop-

erty generally. If the city sued and recovered judgment for the debt arising out of such an obligation, it would be a general lien on all of plaintiffs' real property.

But the answer is more narrow than that. (1) Plaintiffs' contentions are negatived in Contra Costa County v. Cowell Portland Cement Co., supra (1932), 126 Cal. App. 267. It was held therein that the application of the lien provision does not determine the constitutionality of the statute [or ordinance] as a whole (p. 271) particularly where judicial review is called for (pp. 272-273) as by LAMC sec. 96.121(j) in foreclosure. (2) LAMC sec. 96.121 itself provides the complete answer. The procedure for establishing a lien prescribes (LAMC sec. 96.121(a) that the report upon which such lien is to be established shall contain "a description of the real property upon which the building or structure was located," and "the assessment against each lot or parcel of land proposed to be levied." LAMC sec. 96.121(b) calls for objections or protests. If there is any legal objection to such description, the time and place to make it is at such hearing. If plaintiffs then should raise the objection now made, the Council has power to act (LAMC 96.121(d) and power to determine whether the change properly pertains to the land then described. Hutchinson Co. v. Coughlin (1919) 42 Cal. App. 664; Cutting v. Vaughn (1920), 182 Cal. 151.

Where several properties are operated as one unit, a lien over all is valid. (Contra Costa County v. Cowell Portland Cement Co., supra (1932), 126 Cal. App. 267, 276; Warren v. Hopkins (1895), 110 Cal. 506, 510).

VI.

The general demurrer admits all facts well pleaded, for the purposes of the demurrer. But the application of

the ordinance to plaintiffs and the facts of injury as to plaintiffs are speculative, except as to the incurring of expenses to proceed with the hearing. There are no facts to show what the alleged building code violations are, nor are there any denials that the conditions upon which the hearings are to be held do not, or could not possibly violate the municipal building code provisions. There are no facts to negative the possibility of proper official action, or to controvert the presumption that official duty will be regularly performed (Los Angeles Ath. Club v. City of Long Beach (1932), 128 Cal. App. 427, 430). Nor if such duty is regularly performed, have plaintiffs shown it will be necessarily illegal or void.

Therefore, full effect must be given to C. C. P. sec. 526: "An injunction cannot be granted: . . . . 4. To prevent the execution of a public statute by officers of the law for the public benefit;"

In police power cases, the damage or injury may be irreparable; but if there is no demonstrable and actionable wrong, there is no injunctive or other relief, since such detriment is the handmaiden of the police power, to which all persons and property are subject, within constitutional limits. (Barbier v. Connolly, supra (1885), 113 U. S. 27; Lawton v. Steele (1894), 152 U. S. 133; King v. Davenport (1881), 89 Ill. 305, 38 Am. Rep. 89). "The essential requirement of due process is met when the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made. Such a discretion is not arbitrary or so unguided as to invalidate the statute or ordinance." Wheeler v. Gregg, supra (1949), 90 Cal. App. 2d 348, 362; Mitchell v. Morris, supra (1949), 94 Cal. App. 2d 446, 450. No injunctive relief is afforded against such an ordinance

unless there is no possibility of proceeding lawfully under it. (Anderson v. Souza (1952), 38 Cal. 2d 825, 841-845, 243 Pac. 2d 497).

The court cannot presume there will be an unwarranted interference with plaintiffs' property. Ex parte Quong Wo (1911), 161 Cal. 220, 227, 230, 233).

The situation here is like that presented when, under the police power, zoning ordinances are attacked on constitutional grounds. The ordinance will not be invalidated as a whole because some particular application of it, if made, might deprive a citizen of his constitutional rights, as held in Village of Euclid v. Ambler Realty Co. (1926), 272 U. S. 365, 47 S. Ct. 114, 54 A. L. R. 1016. Therein, it is stated (p. 395-396) in regard to a general attack upon the ordinance: "But where the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or a denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance . . . constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality . . . ." and again, at page 396, "When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid."

Plaintiffs have not exhausted their administrative remedy, and declaratory relief is improper. (Imperial Mutual Life Ins. Co. v. Caminetti (1943), 59 Cal. App. 2d 501).

As against anticipatory attacks, such as this, when it is not known what conditions in fact will be found to fall within the ordinance, and hence what ordinance sections will be applied to plaintiffs; when it is not possible to know what, if any, abatement will be ordered; and if ordered, which costs, if any plaintiffs would permit to go to lien, it does not fail within the purview of declaratory relief, since there can be no "existing controversy" based upon assumed facts or conditions not yet determined to exist; the determination of which is delegated to an administrative board. (Metcalf v. Los Angeles County (1944), 24 Cal. 2d 267, 148 Pac. 2d 64; Monahan v. Dept. of Water and Power (1941), 48 Cal. App. 2d 746, 753).

The mere belief that in the future certain provisions of the ordinance may be involved is no basis for a speculative interpretation of their provisions now. (C. C. P. sec. 1061; Merkley v. Merkley (1939), 12 Cal. 2d 543; Conroy v. Civil Service Commission (1946), 75 Cal. App. 2d 450).

"To complain of a ruling, one must be made the victim of it. One cannot invoke, to defeat a law, an apprehension of what might be done under it, and which, if done, might not receive judicial approval." (Lehon v. City of Atlanta (1916), 242 U. S. 53, 56, 37 S. Ct. 270; cf. Headley v. City of Rochester (1936), 272 N. Y. 197, 5 N. E. 2d 198).

A general demurrer has been interposed to the complaint as amended, which after full consideration, we conclude must be sustained without leave to amend. (Nathan

H. Schur, Inc. v. City of Santa Monica (1956), 47 Cal. 2d 11; American Mission Army, Inc. v. City of Lynwood (1956), 138 Cal. App. 2d 817, acts of officials; Paraco Inc. v. Dept. of Agriculture (1953), 118 Cal. App. 2d 348, 358; City of Alturas v. Gloster (1940), 16 Cal. 2d 46, 48-49; Communist Party v. Peek (1942), 20 Cal. 2d 536, 540; Carrier v. Robbins (1952), 112 Cal. App. 2d 32; Fascination Inc. v. Hoover (1952), 39 Cal. 2d 260, 264; cf. Case v. City of Los Angeles (1956), 142 Cal. App. 2d 66, 70).

So far as naked legal questions are concerned, the ruling upon this demurrer is in itself declaratory of the strictly legal rights of the parties. But it must be remembered that the court should not attempt to direct in detail the manner and methods by which an administrative agency should administer the law. (Paraco, Inc. v. Dept. of Agriculture, supra (1953), 118 Cal. App. 2d 348, 358).

With considerable care, each of the LAMC sections has been examined. We are satisfied that in their general scope, the ordinance embracing sections 96.100-96.128 is valid, and that no cause of action is stated for injunctive relief. In declaring the validity of the ordinance in its general scope, by sustaining the general demurrer, there is declaratory relief as far as justified, and the court declines to speculate further upon abstract constitutionality apart from the facts. Nor would amendment aid the complaint; the list of alleged violations might be specifically pleaded, but that is all. Since the determination as to the existence or non-existence of such violations rests first with the Board, this court in advance of the hearings could not and should not interfere by proceedings taking such determination away from the Board in the first instance. If, after hearing and findings, there is an

abuse of discretion or denial of due process, the judicial remedy is available.

Application of the ordinance to existing structures is valid. (Finnegan v. Royal Realty Co., supra (1950), 35 Cal. 2d 409, 412, et seq.; cf. Kabfell v. City of St. Louis (Mo. App.), 282 S. W. 2d 171; Rau v. Redwood City Woman's Club (1952), 111 Cal. App. 2d 546; cf. Block v. Snyder (1951), 105 Cal. App. 2d 783).

Elimination of existing conditions is a valid exercise of the police power. (City of Los Angeles v. Gage, supra (1954), 127 Cal. App. 2d 442). This power is not limited to nuisances per se. (Sullivan v. City of Los Angeles (1953), 116 Cal. App. 2d 807).

ORDER

The demurrer is sustained without leave to amend pursuant to opinion now filed.

LEON T. DAVID

Judge.

Dated May 2, 1958.

APPENDIX C.

CHAPTER IX

ARTICLE VI—DIVISION B—REPAIR, VACATION, DEMOLITION OF DANGEROUS BUILDINGS.

SEC. 96.100. DECLARATION OF PURPOSE:

It is the purpose of the provisions of this division to provide a just, equitable, and practicable method, to be cummulative with and in addition to any other remedy available at law, whereby buildings or structures which are dilapidated, unsafe, dangerous, insanitary, or are a menace to the life, limb, health, morals, property, safety and general welfare of the people of this City, or which tend to constitute a fire hazard, may be required to be repaired, vacated or demolished.

SEC. 96.101. DANGEROUS AND SUBSTANDARD RESIDENTIAL BUILDINGS DEFINED:

(a) **"Dangerous Building."** For the purpose of this division, any building or structure which has any or all of the defects hereinafter described shall be deemed a "dangerous building":

(1) Whenever any door, aisle, passageway, stairway or other means of exit is not of sufficient width or size, or is not so arranged as to provide safe and adequate means of exit, in case of fire or panic, for all persons housed or assembled therein who would be required to, or might, use such door, aisle, passageway, stairway or other means of exit;

(2) Whenever the stress in any materials, members or portion thereof, due to all dead and live loads, is more than one and one-half times the working stress or stresses allowed in Article 1, of Chapter 9 of this Code.

(3) Whenever any portion thereof has been damaged, by earthquake, wind, flood, or by any other cause, in such a manner that the structural strength or stability thereof is appreciably less than it was before such catastrophe and is less than the minimum requirements of this Code for a new building of similar structure, purpose or location.

(4) Whenever any portion or member or appurtenance thereof is likely to fall, or to become detached or dislodged, or to collapse and thereby injure persons or damage property;

(5) Whenever any portion of a building, or any member, appurtenance or ornamentation on the exterior thereof is not of sufficient strength or stability, or is not so anchored, attached or fastened in place so as to be capable of resisting a wind pressure of one-half that specified by Article 1, Chapter 9, of the Los Angeles Municipal Code, without exceeding the working stresses permitted in Article 1 of the Chapter;

(6) Whenever any portion thereof has settled to such an extent that walls or other structural portions have materially less resistance to winds or earthquakes than is required in the case of new construction;

(7) Whenever the building or structure or any portion thereof, because of dilapidation, deterioration, decay, faulty construction, or because of the removal or movement of some portion of the ground neces-

sary for the purpose of supporting such building or portion thereof, or other cause, is likely to partially or completely collapse, or some portion of the foundation or underpinning is likely to fall or give way;

(8) Whenever, for any reason whatsoever, the buiing or structure, or any portion thereof, is manifestly unsafe for the purpose for which it is used;

(9) Whenever the exterior walls or other vertical structural members list, lean or buckle to such an extent that a plumb line passing through the center of gravity does not fall inside the middle third of the base;

(10) Whenever the building or structure, exclusive of the foundation, shows 33 per cent or more damage or deterioration to the member or members, or 50 per cent of damage or deterioration of a non-supporting enclosing or outside wall or covering;

(11) Whenever the building or structure has been so damaged by fire, wind, earthquake or flood, or has become so dilapidated or deteriorated as to become an attractive nuisance to children who might play therein to their danger, or as to afford a harbor for vagrants, criminals, or immoral persons, or as to enable persons to resort thereto for the purpose of committing nuisance or unlawful or immoral acts;

(12) Any building or structure which has been constructed, or which now exists or is maintained in violation of any specific requirement or prohibition, applicable to such building or structure, of the building regulations of this City, as set forth in Article 1 of this Chapter, or of any provisions of Article 7 of Chapter 5 of the Los Angeles Municipal Code relating to the prevention of fire, when so determined and reported by the Chief Engineer, Fire Department, or of Article 1 of Chapter 3 of said Code relating to the protection of health when so determined and reported by the Health Officer, or of any law or ordinance of this State or City relating to the condition, location or structure of buildings;

(13) Any building or structure which, whether or not erected in accordance with all applicable laws and ordinances, has in any non-supporting part, member or portion, less than 50 per cent, or in any supporting member less than 66 per cent of the strength, fire-resisting qualities or characteristics or weather-resisting qualities or characteristics required by law or ordinance in the case of a newly constructed building of like area, height and occupancy in the same location;

(14) Whenever a building or structure, used or intended to be used for dwelling purposes, because of dilapidation, decay, damage, or faulty construction or arrangement, or otherwise, is insanitary or unfit for human habitation or is in a condition that is likely to cause sickness or disease, when so determined by the Health Officer, or is likely to work injury to the health, safety, or general welfare of those living within;

(15) Whenever the building or structure, used or intended to be used for dwelling purposes, has light, air and sanitation facilities inadequate to protect the health, safety, or general welfare of persons living within.

(16) Whenever any building or structure by reason of obsolescence, dilapidated condition, deterioration, damage, electric wiring, gas con-

nections, heating apparatus, or other cause, is in such condition as to be a fire hazard and is so situated as to endanger life or other buildings or property in the vicinity or provide a ready fuel supply to augment the spread and intensity of fire arising from any cause.

(b) **"Substandard Residential Building".** For the purpose of this division, any residential building or structure defined as such by Sec. 91.4902 (s) of this Chapter.

SEC. 96.101.1. OTHER DEFINITIONS:

For the purposes of this Article:

(a) "Board", unless otherwise specified, shall mean the Board of Building and Safety Commissioners.

(b) "Department", unless otherwise specified, shall mean the Department of Building and Safety.

SEC. 96.101.2. DANGEROUS AND SUBSTANDARD RESIDENTIAL BUILDINGS—NUISANCES:

All dangerous buildings and substandard residential buildings within the terms of Sec. 96.100 of this Article are hereby declared to be public nuisances and shall be vacated, repaired, or demolished as hereinafter provided.

SEC. 96.102. INSPECTION—WHEN REQUIRED:

The Board of Building and Safety Commissioners shall cause any building or structure to be inspected for the purpose of determining whether or not it is a dangerous building or substandard residential building within the meaning of this division, in any of the following events:

(a) Whenever that Board, in its reasonable discretion, shall determine that such inspection is necessary;

(b) Whenever the Housing Authority of the City of Los Angeles, acting pursuant to the provisions of Section 8 of the Housing Authorities Law of this State, shall transmit to the Board its written recommendations and findings that such building or structure is in such condition as to be dangerous to the public health, morals, safety or welfare;

(c) Whenever any person files with the Board a verified complaint wherefrom there is, in the opinion of the Board, probable cause to believe that the building or structure is a dangerous building or substandard residential building.

(d) Whenever any member of the Fire Department, Police Department, or Health Department of this City transmits to the Board a written report from the facts of which there is, in the opinion of the Board, probable cause to believe that the building or structure is a dangerous building or substandard residential building.

SEC. 96.103. DUTIES OF DEPARTMENT OF BUILDING AND SAFETY:

When requested by the Board, the Superintendent of Building shall cause any building or structure designated to be inspected. The employee

who performs such inspection shall, in this division, be referred to as the "Building Inspector".

SEC. 96.104. REPORT OF BUILDING INSPECTOR:

Upon the completion of the inspection, the Building Inspector shall file with the Board a written report setting forth the facts as to the condition of the building or structure and the work needed to be done thereon; all in such form as the Board may direct.

SEC. 96.105. BOARD OR SUPERINTENDENT OF BUILDING TO ACT ON REPORT:

If the Board or Superintendent of Building shall determine, from the report of the Building Inspector, that there is probable cause to believe that the building or structure is a dangerous building or substandard residential building, the matter shall be set for hearing and a notice of such hearing shall be given as hereinafter provided.

SEC. 96.106. NOTICE OF HEARING—FORM AND CONTENTS:

Notice of the hearing shall be given upon a form prescribed by the Board. It shall set forth the street address and a legal description, sufficient for identification, of the premises upon which the building or structure is located. It shall contain a brief statement of the conditions mentioned in the report of its Building Inspector which show probable cause to believe that the building or structure is a nuisance within the terms of Sec. 96.101 of this Article. It shall state the date, hour and place of the hearing and shall order all interested parties who desire to be heard in the matter to appear before the Board to show cause why the building or structure should not be ordered repaired, vacated and repaired, or demolished.

SEC. 96.107. NOTICE OF HEARING TO BE POSTED:

One copy of the notice shall be posted in a conspicuous place upon the building or structure involved.

SEC. 96.108. NOTICE OF HEARING—PERSONS ENTITLED TO NOTICE:

One copy of the notice shall be served upon the following: The person, if any, in real or apparent charge and control of the premises involved; the record owner; the holder of any mortgage, trust deed, or other lien or encumbrance of record; the owner or holder of any lease of record; the record holder of any other estate or interest in or to the building or structure or the land upon which it is located.

SEC. 96.109. NOTICE OF HEARING—SERVICE:

(a) **Method of Service.** The notice of hearing shall be served upon all persons entitled thereto either personally or by registered mail. Service by registered mail shall be effective on the date of mailing if a registered letter containing a copy of such notice is mailed, postage prepaid, return receipt requested, to each such person at the address of such person as

it appears on the last equalized assessment roll of the county or as known to the City Clerk. If no such address so appears or is known to the City Clerk, then a copy shall be addressed to such person at the address of the building or structure involved in the proceedings. The failure of any owner or other person to receive such notice shall not affect in any manner the validity of any proceedings taken hereunder.

(b) **Affidavit of Service.** The officer or employee of the Department upon giving notice as provided herein shall file an affidavit thereof with the Board certifying to the time and manner in which such notice was given. He shall also file therewith any receipt card which may have been returned to him in acknowledgement of the receipt of such notice by registered mail.

SEC. 96.110. TIME OF POSTING AND SERVICE OF NOTICE OF HEARING:

The notice of hearing shall be posted and served at least ten days prior to the date set for the hearing.

SEC. 96.111. HEARING:

It shall be the duty of the Board to:

(a) Hold a hearing upon the report of the Building Inspector, and to hear and consider any evidence offered by the owner, occupant, or person in charge and control, mortgagee or beneficiary under any deed of trust, lessee, or any other person having any estate or interest in said building or structure, pertaining to the matter set forth in the report;

(b) Make written findings of fact as to whether or not the building or structure in question is a dangerous building or substandard residential building within the terms of this division.

SEC. 96.112. STANDARDS FOR REPAIR, VACATION AND REPAIR, OR DEMOLITION:

The following standards shall be followed in substance by the Board in ordering the repair, vacation or demolition of any building or structure. Any order to demolish, rendered pursuant to this subsection, shall not indicate an alternative permission to repair; however, an order to repair may be satisfied by demolition.

(a) If the dangerous building or substandard residential building can be reasonably repaired so that it will no longer exist in violation of the Los Angeles Municipal Code, it shall be ordered repaired.

(b) If the dangerous building or substandard residential building is in such condition as to make it dangerous to the health, morals, safety, or general welfare of its occupants, it shall be ordered to be vacated.

(c) In any case where a dangerous building is 50 per cent damaged, or decayed, or deteriorated, it shall be demolished.

(d) In all cases where a dangerous building or substandard residential building cannot be reasonably repaired so that it will no longer exist in violation of the terms of the Los Angeles Municipal Code, it shall be vacated and demolished.

(e) In all cases where a dangerous building or substandard residential building is a fire hazard, existing or erected in violation of the terms of this division or any ordinance of this City, or statute of the State of California, it shall be demolished.

SEC. 96.113. BOARD MAY REQUEST REPORTS OF OTHER DEPARTMENTS:

(a) Whenever in the course of any proceedings taken hereunder, the Board shall have cause to require additional evidence as to whether or not any building or structure is a fire or life hazard, or is detrimental to the health of the persons living therein, in comparison with buildings or structures constructed in accordance with the minimum requirements of Article 1 of Chapter 9 of the Los Angeles Municipal Code, the Board may request that the same be inspected by the Fire Department or by the Health Department, as the case may be, or by both of such departments.

(b) The Department to which such request is directed shall cause the building or structure to be inspected with particular reference to the characteristics inquired about, and a report thereof in writing shall be transmitted to the Board of Building and Safety Commissioners within five days of the receipt of the request for such report. The report shall be considered along with other evidence at the hearing.

SEC. 96.114. ORDER OF BOARD—WHEN TO BE RENDERED:

Within 60 days after the conclusion of the hearing, the Board shall render its decision, either closing the proceedings, or if it finds that the building is a dangerous building or substandard residential building, ordering that it be repaired, vacated and repaired, or demolished.

SEC. 96.115. ORDER TO REPAIR, VACATE AND REPAIR OR DEMOLISH:

If, from a full and fair consideration of the evidence and tesimony received at the hearing and from the report received from the Building Inspector, the Board shall determine that the building or structure involved is a dangerous building or substandard residential building within the terms of this division, then it shall issue an order:

(a) That the building must be repaired, vacated and repaired, or demolished;

(b) That the occupant, lessee, or other person in possession must vacate said building, or that he may remain in possession while repairs are being made.

(c) That any mortgagee, beneficiary under a deed of trust, or any other person having an interest or estate in said building may, at his own risk, repair, vacate and repair, or demolish said building.

SEC. 96.116. ORDER TO REPAIR, VACATE AND REPAIR OR DEMOLISH—CONTENTS:

(a) The order shall set forth the street address of the building or structure and a legal description of the premises sufficient for identification. It shall contain a statement of the particulars which render the

building or structure a dangerous building or substandard residential building and a statement of the things required to be done.

(b) The Board shall specify the time within which the work required must be commenced, which shall be not less than ten days nor later than 30 days after the issuance of the order, and the Board shall further specify a reasonable time within which the work shall be completed.

(c) The time for completion may, by the Board, be extended for cause. This shall be in writing upon the application of an interested party.

SEC. 96.117. ORDER TO REPAIR, VACATE AND REPAIR, OR DEMOLISH TO BE POSTED AND SERVED:

A copy of the order to repair, vacate and repair, or demolish any structure shall be posted in a conspicuous place upon the building, and shall be served in the manner above-prescribed in the case of the notice of hearing, upon all persons to whom the notice of hearing is required to be served.

SEC. 96.118. VIOLATIONS—PENALTIES FOR DISREGARDING ORDER:

(a) The owner or other person having charge and control over any building or structure determined by the Board to be a dangerous building or substandard residential building who shall fail to comply with any order to repair, vacate and repair, or demolish said building shall be guilty of a misdemeanor.

(b) The occupant or lessee in possession who fails to comply with any order to vacate said building in accordance with any order given as provided for in this division shall be guilty of a misdemeanor.

(c) Any person who removes any notice or order posted as required in this division shall be guilty of a misdemeanor.

SEC. 96.119. FAILURE TO COMPLY WITH ORDER—BOARD MAY SELL, REPAIR, OR DEMOLISH BUILDING:

Whenever an order to repair, vacate and repair, or demolish any building or structure has not been complied with within the time set by the Board, or within such additional time as the Board may, for good cause extend, the Board shall have the power, in addition to any other remedy herein provided, to:

(a) Cause the material of any such building or structure to be sold in any manner which the Board may determine upon; provided, however, that any such sale shall be upon condition that the building or structure be forthwith demolished, the wreckage and debris thereof removed and the lot cleaned; the Board may sell any such building singly or otherwise, as the Board may find desirable in order to insure that the consideration obtained from one or any number of such buildings shall be adequate to pay the cost of demolition and of cleaning the sites. Any surplus from the sale of any such building or structure,

or group of buildings or structures, over and above the cost of demolition and of cleaning the sites shall be retained to be distributed to the parties or persons lawfully entitled thereto.

(b) Cause the building or structure to be repaired or demolished by such means as the Board may deem advisable. The cost thereof shall be paid from the "Repair and Demolition Fund" and assessed against the property upon which the particular building or structure is located.

(c) Any work to be accomplished pursuant to this section shall be performed in accordance with established practices of public works.

SEC. 96.120. CITY COUNCIL TO ESTABLISH REPAIR AND DEMOLITION FUND:

(a) The City Council shall set up a special revolving fund to be designated as the "Repair and Demolition Fund". Payments shall be made out of said fund upon the demand of the Board of Building and Safety Commissioners to defray the costs and expenses which may be incurred by said Board in causing the necessary work of repair or demolition to dangerous buildings and substandard residential buildings.

(b) The Council may at any time transfer to such special fund, out of any money in the General Fund of said City, such sums as it may deem necessary in order to expedite the performance of the work of demolition or repair, and the sum so transferred shall be deemed a loan to said special fund and shall be repaid out of the proceeds of the assessment provided for in the following section. All funds collected under the proceedings hereinafter provided for, either upon voluntary payments or as the result of the sale of property after delinquency, shall be paid when collected to the City Treasurer, who shall place the same in the Repair and Demolition Fund.

SEC. 96.121. PROCEDURE FOR ASSESSMENT OF COST OF REPAIR OR DEMOLITION IN EVENT OF DEFAULT BY OWNER:

(a) **Filing of Report—Contents.** The Board shall keep an itemized account of the net expense involved in the repairing or demolishing of such buildings. Upon the completion of the repair or demolition, the Board shall prepare and file with the City Clerk, in duplicate, a report specifying the work done, the cost of the work, a description of the real property upon which the building or structure was located, the names and addresses of the persons entitled to notice pursuant to Sec. 96.108, and the assessment against each lot or parcel of land proposed to be levied to pay the cost thereof. Any such report may include repair or demolition work on any number of buildings or structures on any number of parcels of property, whether contiguous to each other or not.

(b) **Report Transmitted to Council—To be Set for Hearing.** Upon receipt of the report, the City Clerk shall present it to the City Council for consideration. The City Council shall cause notice of the cost of the repair or demolition to be given in the manner and to the persons specified in Sections 96.107 to 96.110, inclusive. Such notice shall specify the day, hour and place when the Council will hear and pass upon a report of the Board of the cost of the repair or demolition, together with any objections

or protests, if any, which may be raised by any property owner liable to be assessed for the cost of such repair or demolition and any other interested persons. Notice of hearing provided by this subsection shall be published at least ten days prior to the date of hearing by one insertion in a daily newspaper published and circulated in the City of Los Angeles.

(c) **Protest and Objections—How Made.** Any person interested and affected by the proposed assessment may file written protest or objections with the City Clerk at any time prior to the time set for the hearing on the report of the Board. Each such protest or objection must contain a description of the property in which the signer thereof is interested and the grounds of such protest or objection. The City Clerk shall endorse on every such protest or objection the date it was received by him. He shall present such protests or objections to the City Council at the time set for the hearing.

(d) **Hearing of Protests.** Upon the day and hour fixed for the hearing the Council shall hear and pass upon the report of the Board, together with any objections or protests which may be raised by any of the property owners liable to be assessed for the cost of the repair or demolition and any other interested persons. The Council may make such revision, correction or modifications in the report as it may deem just, and when the Council is satisfied with the correctness of the assessment, the report as submitted or as revised, corrected or modified, together with the assessment shall be confirmed. The decision of the Council on the report and the assessment and all protests or objections shall be final and conclusive. The Council may adjourn the hearings from time to time.

(e) **Contest.** The validity of any assessment levied under the provisions of this section shall not be contested in any action or proceeding unless the same is commenced within 30 days after the assessment is confirmed. Any appeal from a final judgment in such action or proceeding must be perfected within 30 days after the entry of such judgment.

(f) **Assessment to be Transmitted to Bureau of Assessments.** Upon the confirmation of the assessment, the City Clerk shall transmit the report as modified to the Bureau of Assessments in the Department of Public Works.

(g) **Recordation of Assessment.** The Bureau of Assessments shall record the assessment, as confirmed, in a suitable book to be kept for that purpose in the Bureau of Assessments, and shall append thereto its certificate of the date of such recording. Such recording shall constitute the assessment roll. From the date of such recording all persons shall be deemed to have notice of the contents of the assessment roll.

(h) **Assessment Lien.** Immediately upon the recording of the assessment, the cost so assessed shall constitute a lien on said real property. Such lien shall, for all purposes, be upon a parity with the lien of State, County and Municipal taxes. All such assessments remaining unpaid after 30 days from the date of recording shall become delinquent and bear interest at the rate of one-half of one per cent per month computed upon the date of delinquency and on the first day of each month subsequent to the said date of delinquency. The lien shall continue until the amount thereof and interest is paid or until it is discharged of record.

(l) **Filing of Lien—Form and Contents.** The Bureau of Assessments shall file in the office of the County Recorder of Los Angeles County, a certificate substantially in the following form, to wit:

NOTICE OF LIEN

Pursuant to the authority vested in the Board of Building and Safety Commissioners by provisions of Article 6, Chapter 9 of the Los Angeles Municipal Code, said Board did, on the.....day of ....., 19....., cause the building or structure on the real property hereinafter described to be repaired or demolished (as the case may be) in order to abate a nuisance on said real property, and the Council of the City of Los Angeles did, on the ..... day of .....; 19....., assess the cost of such repair or demolition (as the case may be) upon the real property hereinafter described and cause said assessment to be recorded in the Bureau of Assessments of the Department of Public Works of said City on the ..... day of ....., 19....., and the same has not been paid nor any part thereof, and the said City does hereby claim a lien on said real property for the net expense of the doing of said repairs or demolition (as the case may be) in the sum of $....., and the same shall be a lien upon said real property until the said sum, with interest at the rate of one-half of one per cent per month computed upon the date of delinquency and on the first day of each month subsequent to the expiration of thirty (30) days from the ..... day of ....., 19..... (insert date of recording of assessment) has been paid in full and discharged of record.

The real property hereinbefore mentioned and upon which a lien is claimed, is that certain parcel of land lying and being in the City of Los Angeles, the County of Los Angeles, State of California, and particularly described as follows, to wit:

(DESCRIPTION)

Dated: This ..... day of ..... 19.....

DEPARTMENT OF PUBLIC WORKS
BUREAU OF ASSESSMENTS

By ..... Director.

ACKNOWLEDGEMENT

(j) **Foreclosure.** If the sum assessed is not paid into the Bureau of Assessments within 30 days after the date of the recording of the assessment, the said Bureau of Assessments shall report such non-payment to the City Council and the Council may instruct the City Attorney to bring an action, in the name of the City, to foreclose the lien of the assessment.

SEC. 96.122. INTERFERENCE—PROHIBITED:

It shall be unlawful for any person to obstruct, impede or interfere with any representative of the Board, or with the inspector of any department of this City, or with any person who owns or holds any estate or interest in any building or structure which has been ordered by the Board to be repaired, vacated and repaired, demolished or removed, or with any person to whom such building or structure has been lawfully sold pursuant to the provisions of this division, whenever any such representative of the Board, inspector, purchaser or person having an interest or estate in such building or structure is engaged in repairing, vacating and repairing, or demolishing any such building or structure pursuant to the provisions of this division, or in performing any necessary act preliminary to or incidental to such work, or authorized or directed pursuant hereto.

SEC. 96.123. LIABILITY OF OFFICERS OR EMPLOYEES OF THE CITY:

(a) No officer, agent, or employee of the City of Los Angeles shall be personally liable for any damage incurred or alleged to be incurred as a result of any act required, permitted or authorized to be done or performed in the discharge of his duties pursuant to this division.

(b) Any suit brought against any officer, agent or employee of the City of Los Angeles as a result of any act required, permitted or authorized in the discharge of his duties under this division shall be deemed an action against the City and shall be defended by the City Attorney.

SEC. 96.124. DUTIES OF FIRE DEPARTMENT AND HEALTH DEPARTMENT:

The employees of the Fire Department and Health Department shall make reports in writing to the Board of Building and Safety Commissioners of any building or structure as to which there is cause to believe that the same is a dangerous building or substandard residential building within the terms of this division, whenever the facts thereof shall come to the attention of any such employee in the course of his regular duties.

SEC. 96.125. DUTIES OF THE CITY ATTORNEY:

The City Attorney shall:

(a) Appear, at the request of the Board at any hearing before that Board in regard to dangerous buildings or substandard residential buildings.

(b) Take such legal action as is necessary to carry out the terms and provisions of this division.

SEC. 96.126. REPAIRS TO BE MADE IN ACCORDANCE WITH BUILDING REGULATIONS:

Nothing in this division shall be deemed to permit or authorize any violation of Article 1 of Chapter 9 of the Los Angeles Municipal Code and no repair, alteration or reconstruction shall be made except in the manner required by the provisions of said Article and Chapter.

SEC. 96.127. OTHER PROVISIONS OF THE MUNICIPAL CODE UNAFFECTED HEREBY:

The provisions of this division shall not be deemed to repeal by implication any other provision of the Los Angeles Municipal Code, and the adoption hereof shall not be deemed to affect or diminish the power or authority of any officer or employee of the City to condemn any building or structure erected or maintained in violation of any other provision of said Code.

SEC. 96.128. SEPARABILITY OF PROVISIONS THIS DIVISION:

The City Council hereby declares that it would have adopted each separate provision of this division, regardless of the adoption of any other provision, and if any remedy provided for in this division be held unavailable or limited in effect, such limitation shall not affect the application of any other provision of this division.

FILE COPY

Office Supreme Court, U.S.
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 581

GERALD DUNITZ, *et al.*,

Appellants,

vs.

THE CITY OF LOS ANGELES, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION OF APPELLEES TO DISMISS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

GERALD DUNITZ, *et al.*,

Appellants,

vs.

THE CITY OF LOS ANGELES, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION OF APPELLEES TO DISMISS.

Respondents below and Appellees herein respectfully move that the appeal in this cause be dismissed under Rule 16, subsection 1, paragraph (b) of the Revised Rules of the Supreme Court of the United States upon each of the following grounds.

1. The appeal does not present a substantial federal question;

2. The federal questions sought to be reviewed were not expressly passed on by the California Courts;

3. The judgment rests on an adequate non-federal basis.

Statement of the Facts on Appeal.

This is an appeal from the judgment of the District Court of Appeal for the Second Appellate District of the State of California affirming the judgment of dismissal of the Superior (trial) Court of said State in and for the County of Los Angeles after said Superior Court had sustained a general demurrer to Appellants' amended complaint without leave to amend, and entered a judgment dismissing the action.

The only factual situation which is before this Court is that which is well-pleaded in the amended complaint. Reading that which is well-pleaded in the complaint, the following appears:

Appellants are the owners of a certain parcel of industrial property in the City of Los Angeles upon which are located some thirty commercial buildings of various ages and types of construction having a total valuation of One Million Dollars.

The City of Los Angeles has from time to time adopted certain ordinances enacting and amending a Municipal Code, within which are contained certain sections, namely Sections 96.100 through 96.128, which provide for the repair, vacation or demolition of "dangerous or substandard" buildings. These Sections comprise Division B of Article 6 of Chapter 9 of said Code, which Chapter regulates matters of building construction and maintenance.

In December of 1956 the Appellants received from the Department of Building and Safety of the City of Los Angeles a notice under the authority of said Article and

Chapter of the Municipal Code stating that said Department had inspected certain buildings located on Appellants' property and had filed a report as to the condition of the buildings thereon with the Board of Building and Safety Commissioners of said City, and that the Board, after determining from the report that there was probable cause to believe that said buildings are dangerous and constitute a public nuisance, set the matter for hearing before the Board as prescribed by said Article and Chapter of said Code in February of 1957.[1] That accompanying said notice the Appellants received a copy of said inspection report.

Subsequently, the said Department inspected and similarly reported to said Board on certain additional buildings located on Appellants' said property. The Board continued the matters previously set for hearing several times until in November of 1957, all matters were consolidated and set for hearing in January of 1958. Notices of each such additional inspection and hearing date were sent to and received by the Appellants.

In December of 1957, and prior to the date set for the hearing, the Appellants requested said Board to amend the property descriptions contained in the said notices, or, in

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[1]Appellants' statement with respect to the content of said notices as set forth on page 6 of the Statement of Jurisdiction is not in accord with the record. Appellants state that the notices require Appellants "to show cause why said buildings should not be ordered demolished." On the contrary, said notices, as set forth in Paragraph VIII of their complaint, state that Appellants are ordered to appear and show cause why said buildings should not be condemned as public nuisances and abated by reconstructing or properly repairing them or by razing and removing them.

the alternative, to continue the hearing until such time as the appellants could test the validity of the proceedings in Court. Shortly thereafter Appellants filed the subject complaint for injunction and declaratory relief.

The judgment of the Superior Court is set forth as an exhibit in the Record on Appeal herein.

The "Opinion and Order Upon General Demurrer" of said Court is set forth in Appendix B of the Appellant's Statement of Jurisdiction on file herein. This memorandum opinion does not constitute a judgment; it is merely an expression of the thinking of the trial court. (Opinion of District Court of Appeal Herein, Statement of Jurisdiction, Appendix A, page 6.)

The opinion of the District Court of Appeal affirming the judgment of the Superior Court is set forth in Appendix A of the Statement of Jurisdiction. Said opinion constitutes the judgment of the District Court of Appeal.

Basis of the Decision of the District Court of Appeal of the State of California.

In affirming the judgment of dismissal the District Court of Appeal makes the following statements:

"We have reached the conclusion that the lower court properly exercised its discretion under section 1061 of the Code of Civil Procedure in sustaining the demurrer and thereby denying the plaintiffs declaratory relief. Whether declaratory relief should be granted is a matter within the trial court's discretion and its denial of that remedy will not be disturbed on appeal unless it is clearly shown that the discretion was abused. (Citation of Authority)" (App. A, Statement of Jurisdiction, p. 2)

"It would unduly prolong this opinion and serve no useful purpose to state in detail the controversies that are alleged to exist between the parties. Suffice it to say that none of them state a present existing controversy based upon facts alleged to exist in the present proceedings to which declaratory relief should be addressed." (App. A, Statement of Jurisdiction, pp. 4 and 5)

"The trial court properly refused to undertake by declaratory judgment to define in the abstract the meaning of the numerous provisions of the ordinance under consideration or the constitutionality of their application by the defendants. (Citation of Authority)" (App. A, Statement of Jurisdiction, pp. 6 and 7)

Statement of the Case on Appeal.

It appears from Appellants' Statement of Jurisdiction:

1. That Appellants seek a judicial declaration that sections 90.100 through 90.128 of the Los Angeles Municipal Code (As set forth in Appendix C of the Statement of Jurisdiction) are invalid *on their face*, and seek further to have enforcement of said sections against them enjoined.

2. That Appellants seek such declaration and injunction to halt a course of proceedings conducted by the Board of Building and Safety Commissioners of the City of Los Angeles and instituted by said Board to inquire into a report submitted to it by the Department of Building and Safety of said City stating that certain commercial buildings owned by the Appellants and located within the City of Los Angeles contained some 340 deficiencies.

3. That Appellants seek such declaration and injunction before such hearings have been commenced, and before said Board has received evidence, made a determination thereof or issued any order with respect to Appellants' property.

4. That Appellants seek and have continuously sought herein, judicial intervention at the inital stages of administrative proceedings, and before completion of the adnfinistrative process.

5. That Appellants seek such intervention despite the fact that no order adverse to the Appellants may result from said administrative proceedings; and despite the fact that if any such order does result therefrom, that such an order may be valid and proper in light of the facts adduced.

6. That Appellants seek such intervention despite the fact that Appellants have an adequate remedy with which to test the validity or propriety of any order which may result therefrom under Section 1094.5 of the California Code of Civil Procedure.[2]

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[2]Sec. 1094.5 Cal. Code Civ. Procedure is set forth in full as Appendix A of this motion to dismiss.

ARGUMENT.

I.

The Judgment of the District Court of Appeal of the Second Appellate District of the State of California Affirming the Judgment of the Trial Court Rests on an Adequate Nonfederal Basis.

A. The Decision of the District Court of Appeal Affirming the Judgment of Dismissal of the Superior Court Rests on the Nonfederal Basis of California Pleading and Practice.

It is apparent on the face of the Record on Appeal that neither the judgment of the Superior Court nor the judgment affirming it of the District Court of Appeal specifically decides the constitutionality of sections 90.100 through 90.128 of the Los Angeles Municipal Code.

As set forth hereinabove, the decision of the District Court of Appeal is based entirely upon the California law, as set forth in statutes and judicial decisions, with respect to pleading and practice; and as such is not properly subject to review by this Court. (*Western Union Telegraph Co. v. Wilson*, 213 U. S. 52; *Chappell Chemical and Fertilizer Co. v. Sulphur Mines Co. of Virginia*, 172 U. S. 465; *O'Neil v. Vermont*, 144 U. S. 323; *Hollery v. Lawrence*, 317 U. S. 518, rehearing denied 318 U. S. 798).

The District Court of Appeal makes specific reference to section 1061 of the California Code of Civil Procedure and states that in its opinion the trial court's dismissal of the action upon sustaining a general demurrer to Ap-

pellants' amended complaint was a proper exercise of its discretion thereunder. Said section states:

> "The Court may refuse to exercise the power granted by this Chapter. (Declaratory Relief Act of the State of California, Sec. 1061 *et seq.* of the Cal. Code of Civ. Proc.)[3] in any case where its declaration or determination is not necessary or proper at the time and under all the circumstances." (Parenthesis added; California Statutes, 1921, p. 689).

In justifying its decision, and in further emphasis of the fact that the decision of the trial court is based entirely upon California pleading and practice, the District Court of Appeal states:

> "This is so because it cannot be determined from the complaint what the nature or character of the deficiencies in plaintiffs' building are asserted to be and it cannot therefore be determined whether the plaintiffs will be adversely affected by the numerous sections of the ordinance here attacked in the proceedings commenced by the defendants. What the plaintiffs seek in this action is not a declaration of their rights under the ordinance as applied to a definite factual situation but is an advisory opinion from the courts as to the validity and meaning of the numerous sections of the code attacked." (App. A. Statement of Jurisdiction, p. 5)

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[3]Sec. 1060, Cal Code of Civ. Proc. is attached hereto as Appendix B.

B. The Decision of the District Court of Appeal May Be Adequately Supported on the Nonfederal Basis of Failure to Exhaust Administrative Remedies.

The California Supreme Court has repeatedly held that available and adequate administrative remedies must be exhausted before resort may be had to the California courts for any relief. (*United States v. Superior Court*, 19 Cal. 2d 189; *Abelliera v. District Court of Appeal*, 17 Cal. 2d 280, 132 A. L. R. 715; *Lynn v. Duckel*, 40 Cal. 2d 845; *Imperial Mutual Life Insurance Co. v. Caminetti*, 59 Cal. App. 2d 501; *Metcalf v. County of Los Angeles*, 24 Cal. 2d 267.)

Thus, it is the rule of California pleading and practice that before available and adequate administrative remedies are exhausted, a plaintiff cannot state facts sufficient to constitute a cause of action for any judicial relief (except where to exhaust the remedy would result in irreparable injury) for the reason that until such exhaustion the California courts do not have jurisdiction to proceed. This rule applies even where plaintiff attacks the validity of the statute providing the remedy to be exhausted.

The California rule in this respect is well stated in the case of *United Insurance Co. v. Maloney*, 127 Cal. App. 2d 155, at pages 158-159, in which this Court denied petition for writ of certiorari, 348 U. S. 937.

In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52, it is said:

> "Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the pre-

scribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

The Appellees respectfully submit that this statement is particularly applicable to and determinative of the instant case.

II.

The Federal Question Sought to Be Reviewed Here Was Not Expressly Passed on by the California Courts.

Both the trial court and the District Court of Appeal have declared that Appellants' amended complaint is properly subject to general demurrer under the applicable law of California pleading and practice for the reason that said complaint fails to state *facts* sufficient to constitute a cause of action for either injunctive or declaratory relief.

Therefore, not only does the decision of the District Court of Appeal rest on an adequate nonfederal basis, it is apparent from the face of said complaint and from the Record on Appeal that Appellants have failed to properly raise the constitutionality of sections 96.100 through 96.128 of the Los Angeles Municipal Code before the California courts.

Furthermore, it is apparent from its opinion herein that the federal question sought to be presented in this appeal was not expressly passed upon by the District Court of Appeal.

The only statement made by the District Court of Appeal which might be asserted to constitute a decision by said court on the validity of the challenged sections of the Los Angeles Municipal Code is the following:

> "The defendant city has the power through its administrative agency to abate nuisances and within constitutional limits to force property owners to abate conditions which in fact constitute nuisances or hazards to the public health or safety and neither this court nor could the trial court assume that in the present proceedings the defendants will attempt to exercise the police power of the city beyond its constitutional limits. If they do so the plaintiffs have an adequate remedy under section 1094.5 of the Code of Civil Procedure and if in such proceedings the decision should be adverse to them, by appeal from such decision." (App. A, Statement of Jurisdiction, p. 6)

It is obvious that said statement is not an expression of the court upon the constitutionality of sections 96.100 through 96.128 of the Los Angeles Municipal Code, but is a further expression by the court of Appellants' present position before the California courts with respect to the jurisdiction and appropriateness of said courts to proceed under the allegations as set forth in the amended complaint.

As is stated by the District Court of Appeal (App. A Statement of Jurisdiction, note 2, p. 6), the extended opinion of the trial court (App. B, Statement of Jurisdiction) does not constitute a judgment in any case, or the judgment of the trial court herein, but merely is an expression of the thinking of said court.

Thus, it would appear that the following statement made by this Court in the case of *Lynch v. New York ex rel. Pierson*, 293 U. S. 52 at page 54 is particularly appropriate to and further determinative of this appeal:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it actually decided or that the judgment as rendered could not have been given without deciding it."

See also:

Durley v. Mayo, 351 U. S. 277, rehearing denied 352 U. S. 859.

III.

This Appeal Does Not Present a Substantial Federal Question.

A. This Appeal Fails to Present a Substantial Federal Question for the Reason That Appellants Have Failed to Exhaust Available and Adequate Administrative Remedies.

The exhaustion of available and adequate administrative remedies is a jurisdictional condition precedent to obtaining judicial relief even on constitutional grounds in the federal courts, including the Supreme Court of the United States. (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Lichter v. United States*, 334 U. S. 742; *Public Service Comm. of Utah v. Wycoff* 344 U. S. 237; *Bates v. Batte*, 187 F. 2d 142, cert. denied 342 U. S. 815; *Holmes v. United States*, 89 Fed. Supp. 894, affirmed 339

U. S. 927, rehearing denied 339 U. S. 954; *Perkins v. Endicott Johnson Corp.*, 128 F. 2d 208, affirmed 317 U. S. 501; and most recently, *Ohio ex rel. Jaus v. Carlton*, 154 N. E. 2d 150, Ohio, appeal dismissed 359 U. S. 312, 3 L. Ed. 2d 831).

In connection with the rule above-stated the following statement of this Court in the case of *Public Service Comm. of Utah v. Wycoff*, 344 U. S. 237, at page 246 appears to be particularly appropriate here:

> "* * * the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. (Citation of Authority). Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts." (Parenthesis added.)

In an attempt to side-step this settled rule of federal judicial practice, appellants urge that an exception should be made in their case on the grounds that the cost of exhausting the administrative remedy is great and that the outcome is a foregone conclusion.

Their argument with respect to cost has already been settled by this Court in the case of *Myers v. Bethlehem Shipbuilding Corp., supra*, 303 U. S. 41. Their argument

with respect to the assertion that the outcome of the administrative proceeding before the Board of Building and Safety Commissioners is a foregone conclusion is not supported by *facts* contained in the Record on Appeal or in the Statement of Jurisdiction; and is contrary to sound reason, to the decisions of the California courts sustaining similar proceedings by the Appellee Board (See particularly: *Stoetzner v. City of Los Angeles*, 170 A. C. A. 485, 338 P. 2d 971; *Perepletchikoff v. City of Los Angeles*, 174 A. C. A. 749, 345 P. 2d 261), and to the California and federal presumption that official duty will be regularly and properly performed. (Cal. Code, Civ. Proc., sec 1963 (15); *Poulos v. State of New Hampshire*, 345 U. S. 395, rehearing denied 345 U. S. 978).

The principle case cited by Appellants to sustain their position in this respect is the recent case of *Staub v. Baxley*, 355 U. S. 313, in which this Court held that a substantial federal question was presented with respect to a City of Baxley, Georgia ordinance requiring a permit to solicit membership in a labor union despite the fact that the appellant in that case had failed to apply for or obtain the required permit.

The *Staub* case is easily distinguishable on its facts from the principle laid down by this Court in such cases as *Myers v. Bethlehem Shipbuilding Corp., supra*, 303 U. S. 41; and as distinguished is not in point in this appeal.

In the *Staub* case the ordinance in question provided no administrative remedy or accusatory process as is involved here. The ordinance merely required a permit which Staub refused to obtain, whereupon he was charged with and convicted in a Georgia court of violating the ordinance. There was no question in the *Staub*

case of an interference with an administrative proceeding or of the exhaustion of an available administrative remedy; but only the question of whether Mr. Staub, a union organizer, could be lawfully required by the subject ordinance to obtain a permit as a condition precedent to engaging in his occupation.

B. This Appeal Fails to Present a Federal Question With Respect to Sections 96.100 Through 96.128 of the Los Angeles Municipal Code for the Reason That These Sections Constitute a Valid and Proper Exercise of the Police and Taxing Powers of the City of Los Angeles.

1. THE SUBJECT SECTIONS OF THE LOS ANGELES MUNICIPAL CODE ARE REASONABLY RELATED TO ACCOMPLISHING A PUBLIC HEALTH, SAFETY, MORALS OR GENERAL WELFARE OBJECTIVE, AND ARE NOT ARBITRARY.

Assuming, for the sake of argument only, that Appellants' contention is correct: that the decision of the District Court of Appeal, although not expressly so, has the effect of deciding and upholding the constitutionality of sections 96.100 through 96.128 of the Los Angeles Municipal Code on their face. Such a decision, even if it had been made, would not present a federal question to this Court for the reason that said sections do not deprive the appellants of their property without due process of law nor deny them the equal protection of the law. On the contrary, said sections constitute a valid and proper exercise of the police and taxing powers of the City of Los Angeles, a freeholders chartered municipal corporation, organized and existing under the Constitution and laws of the State of California.

The term "police power" is an attribute of sovereignty, and is founded on the *duty* of the state to protect its

citizens and to provide for the safety, good order and well being of society.

Under its police power, the City of Los Angeles, in a proper case, has the power, acting in the interest of the public health, safety, morals or general welfare, to regulate private property. (*L'Hote v. New Orleans*, 177 U. S. 587; *Erie Railroad Company v. Williams*, 233 U. S. 685; *Miller v. Board of Public Works*, 195 Cal. 477, 38 A. L. R 1497; *Clemons v. City of Los Angeles*, 36 Cal. 2d 95).

As a proper exercise of its police power, the City of Los Angeles, may establish by ordinance the conditions which constitute a public nuisance with respect to buildings and may by ordinance provide for the abatement of such conditions; and is not bound by or limited to other statutory or common law concepts of either the definition or method of abatement of a public nuisance. (*Lawton v. Steel*, 152 U. S. 133; *Maguire v. Reardon*, 41 Cal. App. 596; aff'd 255 U. S. 271; *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80; *Haddacheck v. Sebastian*, 239 U. S. 394, affirming 165 Cal. 416; *Berman v. Parker*, 348 U. S. 26; *People v. Johnson*, 129 Cal. App. 2d 1; *Odd Fellows Cemetery Assn. v. San Francisco*, 140 Cal. 226, 231; *Boyd v. Sierra Madre*, 41 Cal. App. 520.)

As the abatement of public nuisances is one aspect of the police power, the ordinance defining the nuisance (or hazardous or objectionable condition) and providing the methods for the abatement of such a condition is valid if it meets the test of a proper exercise of such a power, to wit: if it has a reasonable relation to achieving a public health, safety, morals or general welfare objective, and is not arbitrary. This test is one of *reasonableness*, not scientific precision; and such a regulation will not be declared invalid because a court may regard it as ineffectual,

or harsh, or in aid of an objectionable policy. (*First National Benefit Society v. Garrison*, 59 Fed. Supp. 962, 155 F. 2d 552; *California State Auto Assn. Inter-Insurance Bureau v. Maloney*, 341 U. S. 105; *Sandstrom v. Cal. Horse Race. Board*, 31 Cal. 2d 401 cert. denied 355 U. S. 814, 3 A. L. R. 2d 90). The precise *term* used to designate such condition is immaterial. What is material are the conditions established and the methods provided.

The challenged sections of the Los Angeles Municipal Code meet this test.

These sections require:

(1) An investigation to determine initially whether there is probable cause to believe that a building is "dangerous," or if residential, "dangerous or substandard" *in fact* within the terms of the applicable ordinances;

(2) A hearing (after notice has been given to all parties) to ascertain and gather all of the evidence and testimony available with respect to the condition of the building *in fact* in order to ascertain whether such conditions constitute the building as a "dangerous or substandard" building, and if so, to determine the proper method of abating the nuisance.

(3). Written findings of fact based upon the evidence adduced; and

(4) A full and fair consideration of such evidence in order to determine if the building is "dangerous or substandard," and if so, whether it can be reasonably repaired, or whether it must be demolished.

It is settled in the California law of statutory construction that the standards required for a valid delegation of legislative power to an administrative body need be only as detailed as the subject matter permits and requires

(*California State Auto etc. Bureau v. Downey*, 96 Cal. App. 2d 876; *Gaylord v. City of Pasadena*, 175 Cal. 433; *Mitchell v. Morris*, 94 Cal. App. 2d 446); and that the essential requirement of due process is met when the administrative body is required to determine the existence or non-existence of the necessary facts before any decision by them is made. (*Wheeler v. Gregg*, 90 Cal. App. 2d 348, *In re Petersen*, 51 Cal. 2d 177).

Section 96.101 (a) provides 16 conditions which may constitute a building as "dangerous"; and Section 96.101 (b) sets forth the conditions which may constitute a residential building "substandard" by reference to Division 49 of Article 1 of Chapter 9 of the Los Angeles Municipal Code relating to Housing Standards.

Section 96.101.2 declares that all "dangerous buildings or substandard residential buildings" are public nuisances which shall be repaired, vacated or demolished as set forth in Section 96.112.

Section 96.112 provides the following standards for the repair, vacation, or demolition of "dangerous buildings or substandard residential buildings:"

"(a) If the dangerous or substandard residential building can be *reasonably repaired so that it will no longer exist in violation of the Los Angeles Municipal Code*, it shall be ordered repaired.

(b) If the dangerous or substandard residential building is in such condition as to make it *dangerous to the health, morals, safety or general welfare of its occupants*, it shall be ordered vacated.

(c) In any case where a dangerous building is 50 *per cent damaged or decayed, or deteriorated*, it shall be demolished.

(d) In all cases where a dangerous building or a substandard residential building *cannot be reasonably repaired so that it will no longer exist in violation of the terms of the Los Angeles Municipal Code*, it shall be vacated and demolished.

(e) In all cases where a dangerous building or a substandard residential building is a *fire hazard, existing or erected in violation of the terms of this division or any ordinance* of the City, *or statute* of the State of California, it shall be demolished." (Emphasis added.)

In addition to defining and providing a method for the abatement of public nuisance buildings, said sections permit the City to abate the nuisance if the owner of the building refuses to do so and to recover the cost of the abatement which it performs through the imposition of an assessment lien upon the real property upon which the particular building was located. (Secs. 96.119 and 96.120.1). Before such a lien may be imposed upon such property, however, a regular assessment proceeding before the Los Angeles City Council is required, including the giving of notice, the holding of a hearing before the Council, the hearing of protests against the assessment, and the recordation of the lien if imposed. (Sec. 96.121.)

As none of these provisions are at issue herein, the Appellees will not burden this argument by discussing them further.

2. APPELLANTS' CONTENTIONS WITH RESPECT TO THE MEANING OF THE SUBJECT SECTIONS OF THE LOS ANGELES MUNICIPAL CODE AND TO THEIR ENFORCEMENT BY THE APPELLEES ARE NOT SUPPORTED BY THE PLAIN MEANING OF THEIR PROVISIONS OR BY THE FACTS IN THE RECORD ON APPEAL.

These sections do not declare wooden buildings *per se*, to be demolishable public nuisances, regardless of their location. The particular section cited by the Appellants in support of such contention (Sec. 90.101 (a) (13)) does not refer to wooden buildings. On the contrary it states:

> "Any building or structure, whether or not erected in accordance with all applicable laws and ordinances, has in any non-supporting part, member or portion, less than 50 per cent, or in any supporting member less than 66 per cent of the strength, fire resisting qualities or characteristics weather-resisting qualities required by law or ordinance in the case of a newly constructed building of like area, height and occupancy in the same location."

(is a dangerous building).

This section merely provides one of the criteria for determining the existence of a "dangerous" building. It is applicable to all buildings, wooden or otherwise, regardless of where located, in a fire district or otherwise. It does not provide any standard for and is essentially unrelated to, the determination of what is to be done about such conditions if they are found to exist.

Appellees do not contend that they have the power to destroy property which is not in *fact* deleterious to the public health, safety and general welfare. On the contrary,

Appellees contend that the provisions of sections 90.100 through 90.128 of the Los Angeles Municipal Code establish reasonable standards *in fact* for the determination of the existence of unsafe and hazardous structures (or portions thereof) and for the determination of the manner or method of the abatement of such structures or the conditions existing in them.

Appellants' statement that Appellees are engaged in a comprehensive program of municipal rehabilitation in its central city, is not only no more than a re-statement of the legal conclusion to that effect in their amended complaint, it is not supported by facts contained in the Record on Appeal, is wholly immaterial to the determination of the validity of the subject sections of the Los Angeles Municipal Code on their face and at this stage of the administrative process, and flies in the face of the fact that the California courts have sustained the subject administrative process and orders resulting therefrom. (*Stoetzner v. City of Los Angeles*, 170 A. C. A. 485, 388 P. 2d 971; *Perepletchikoff v. City of Los Angeles*, 174 A. C. A. 749, 345 P. 2d 261).

These sections of the Los Angeles Municipal Code do not shift the burden of proof to the property owner, a is contended by Appellants. The language used in section 90.106 is commonly used in accusatory proceedings of this type. For example, similar language is used in the public nuisance building abatement provisions of the Housing Act of the State of California. (Secs. 17821-29, Cal. Health and Safety Code). Moreover, it has been specifically held by the California courts, in a case cited by Appellants, that the language contained in said section does not shift the burden of proof onto the property owner, but that such burden is upon the City. (*Armi-*

stead v. City of Los Angeles, 152 Cal. App. 2d 319). Appellees do not now contend and have never contended otherwise.

Appellants' contention that the subject sections of Los Angeles Municipal Code unjustly discriminate against owners of buildings subjected to proceedings had thereunder as distinguished from owners of buildings not so subjected is not supported by the plain meaning of their provisions.

In the first place, a building is not "subjected" to such proceedings unless the Board or the Superintendent of Buildings shall have first determined from the report of the Building Inspector that there is probable cause to believe that the building is "dangerous or substandard." This establishes a distinction in fact between such buildings and others.

Furthermore, the stresses required for repair or demolition of such a building may properly, within the framework of the Building Codes, be more restrictive. In fact, however, they are not.

Section 91.0103 (a), with which Appellants claim the standards provided in sections 90.101 (a) (2), (10) and (13) conflict and thus allegedly result in unlawful discrimination, states:

> "(a) Maintenance. Any portion of any building or structure which is a menace to life or limb, health, property or public welfare shall be restored to a reasonable condition of stability and safety, or shall be made to conform to the regulations of this Code, (Building Code), or be demolished. A building or portion thereof shall be presumed to be a menace to life or limb, health, property or public welfare if any of the following conditions exist:

(1) When the stresses in any member, computed on the basis of the loads specified by this Code (Building Code), exceed twice the working stresses permitted by this Code. (2) When any exit, fire-protective construction or safety device does not provide the required degree of security to life or limb, health, property or public welfare. (3) When the building or structure is a dangerous building or a substandard residential building within the terms of the Los Angeles Municipal Code." (Parenthesis added.) These provisions apply to all buildings in the City.

It is apparent that Appellants have overlooked subdivision (3) of section 91.0103 (a), and have confused the term "working stresses" used in said section with the term "stress—due to all dead and live loads" used in section 96.101 (a) (2).

Moreover, the standards set forth in Sections 96.101 (a) (10) and (13) are specifically recognized by subdivision (3) of section 91.0103 (a); provide entirely different tests or criteria for structural stability than is provided by the "working stresses concept" of subdivision (1) of section 91.0103 (a); and provide, in addition to a test of structural stability, a measure of dilapidation, deterioration, fire-resistiveness and weather-resistiveness not found in section 91.0103 (a) (1).

The provisions of Sections 96.101 (a) (2), (10), and (13) apply only to buildings which have been inspected and which exhibit conditions causing a determination of probable cause to believe such buildings are dangerous or substandard.

C. This Appeal Fails to Present a Federal Question With Respect to the Application of the Ordinance to the Appellants for the Reason That on the Basis of the Facts Contained in the Record on Appeal Such a Question Is Not Before This Court.

As previously discussed hereinabove, Appellants' contention that Sections 96.100 through 96.128 will be unlawfully and improperly enforced against them is not supported by *facts* contained in either the Statement of Jurisdiction or the Record on Appeal; is based wholly upon statements of legal conclusions contained in their amended complaint; and is contrary to the California and federal presumption that official duty will be regularly and properly performed. Moreover, as has been specifically discussed by the California courts herein, such a contention is premature.

Appellants' contention that they have been denied the due process of the law because of asserted deficiencies in the notices of the hearing which they have received serves only to further confuse the real and even asserted issues in this appeal.

Appellants do not claim a lack of statutory notice; and on the basis of the facts contained in the Record on Appeal apparently possess actual notice of the nature and character of the administrative hearing with respect to which they seek judicial intervention. On the contrary, Appellant's contention in this respect is that the notices which they have received described the property, consisting of several buildings located upon a fairly large industrial site, as a whole without separate and individual legal descriptions of the particular building sites within said larger site.

With respect to this matter, the Superior Court, in its "Opinion and Order Upon General Demurrer" states:

> "* * * Pages 28-29 (subparagraph) 25 (of paragraph XV of Appellants' amended complaint on file herein). No constitutional rights are prejudiced. (1) as a matter of notice, this paragraph (subparagraph 25 of paragraph XV of said complaint) demonstrates plaintiffs' full knowledge of the scope and extent of the inquiry in these proceedings. (2) Since these structures are identified, the exact land on which each is located is *ipso facto* identified (Cal. Civil Code sec. 3538). (3) Where every structure is upon an identified single parcel of land in one ownership, no constitutional or other legal parcel of land in one ownership, no constitutional or other legal problems are involved. (4) There is no requirement that the physical limits of each precise portion of a larger parcel of plaintiffs' property upon which each building is physically situated be described in institution of a proceeding. (Los Angeles Municipal Code Sec. 91.106) (5) There is no reasonable doubt that defendants are proceeding against every building in which there is alleged to exist some condition in violation of law. * * * " (App. B, Statement of Jurisdiction, p. 35; Parenthesis added.)

Appellants' argument in support of this contention, that because these administrative proceedings may culminate in the imposition of an assessment lien against their property, the exact legal description of each building site on the entire industrial site is thereby required, is, like the contention which it attempts to support, confusionary. Such an argument ignores, and thus, misrepresents the specific provisions in the subject sections of the Los Angeles Municipal Code providing for further notice

and hearing as a part of a regular assessment proceeding before such a lien may be imposed in those cases where the property owner's refusal to abate the nuisance brings such a further proceeding into being.

Summary.

Perhaps the most important résumé which Appellees might make of their argument and the matters contained in the Statement of Jurisdiction, apart from the matters with respect to the appellate jurisdiction of this Court herein which will not be further discussed, is to emphasize the spurious and mis-leading nature of Appellants' contentions.

Appellants' case before this Court, ignoring the matters relating to the appellate jurisdiction of this Court, is simply this:

Are Sections 96.100 through 96.128 of the Los Angeles Municipal Code so patently unrelated to the public health, safety, morals or general welfare that there is no way in which Appellees may lawfully proceed under them?

Nevertheless, Appellants use such mis-leading arguments as: the City is using these sections to rehabilitate its central city without payment and without proving that such rehabilitation is necessary in fact; the sections declare a wooden building to be a demolishable public nuisance; and the City cannot and will not use these sections lawfully.

A specific example of the spurious nature of Appellants' arguments is found in their closing statement in subparagraph 2, page 14, of their Statement of Jurisdiction, to wit:

> "The issue here is unlawfullness of the tribunal and its procedure, not of its product."

It is difficult to understand such a statement in light of Appellants' numerous contentions to the effect that Appellees have not and will not proceed lawfully and properly under the ordinance.

Furthermore, it is difficult to understand just exactly what such a statement means. If the tribunal's product is acceptable, as it has been determined by the California courts to be (*Stoetzner v. City of Los Angeles*, 170 A. C. A. 485, 338 P. 2d 971; *Perepletchikoff v. City of Los Angeles*, 174 A. C. A. 749, 345 P. 2d 261), and as it is presumed to be until evidence is received to the contrary (*Poulos v. State of New Hampshire*, 345 U. S. 395, rehearing denied 345 U. S. 978), it seems only logical to assume that the tribunal and its procedure must also be acceptable; or at least not so lacking in constitutionally accepted authority nor so unrelated to the public health, safety, morals or general welfare that there is no possibility of proceeding lawfully under it.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the appeal in this cause should be dismissed.

Respectfully submitted,

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APPENDIX A.

Section 1094.5, *California Code of Civil Procedure.*

"[Inquiry into validity of administrative order or decision] (a) Where the writ is issued for the purpose of inquiring into the validity of any administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

"(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the

findings are not supported by substantial evidence in the light of the whole record.

"(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

"(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

"(f) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such notice whichever occurs first; provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the

notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings. (California Statutes 1945, Chapter 868).

APPENDIX B.

Section 1060, *California Code of Civil Procedure.*

"[Declaratory relief.] Any person interested under a deed, will, or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." (California Statutes, 1921, page 689; The construction of a State statute such as the California Declaratory Relief Act, is the exclusive responsibility of the State courts, and is not subject to review by this Court. (*Speiser v. Randall*, 357 U. S. 513).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 581

GERALD DUNITZ, *et al.*,

Appellants,

vs.

THE CITY OF LOS ANGELES, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

REPLY OF APPELLANTS TO MOTION TO DISMISS.

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GERALD DUNITZ, *et al.*,

Appellants,

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THE CITY OF LOS ANGELES, *et al.*,

Appellees.

REPLY OF APPELLANTS TO MOTION TO DISMISS.

The motion to dismiss this appeal is without merit for the following reasons:

I.

Errors and Inaccuracies in Appellees' Statement of the Case on Appeal.

Numbered paragraph 2 of Appellees' Statement of the Case on Appeal (Mo. Dis. p. 5) states that Appellee Department of Building and Safety submitted a report to Appellee Board of Building and Safety Commissioners

> ". . . stating that certain commercial buildings owned by the Appellants . . . contained some 340 deficiencies."

The word "deficiencies" as so used is not defined or explained and might create a misimpression if not challenged. The pleading on the subject is in Paragraph XIII

of the Complaint, [R. p. 19, line 30, to p. 20, line 2], which reads as follows:

> "The said building inspectors' reports accompanying said Notices of Hearing set forth approximately 340 separate specifications of instances in which the said inspectors purportedly believe that some of plaintiffs' said buildings fail to comply with present building laws. . . ."

It is the essence of this appeal that the challenged ordinance is unconstitutional for the reason, among others, that it ordains buildings of Appellants to be demolishable nuisances only because they

> ". . . fail to comply with present building laws . . ."

notwithstanding that they were lawfully constructed [R. p. 14, lines 3-4.]

Paragraph 5 of Appellees' Statement of the Case on Appeal (Mo. Dis. p. 6) states that

> ". . . no order adverse to the Appellants may result from said administrative proceedings;"

but if such an order does eventuate it may be

> ". . . valid and proper in light of the facts adduced"

in the administrative hearing. This is not true for the reasons hereinafter discussed. Appellee Board is mandatorily commanded by the challenged ordinance to order the demolition of some of Appellants' buildings, regardless of whether they are *in fact* dangerous at all and regardless of whether, if dangerous in fact, they are so dangerous as to reasonably require demolition for the protection of the public.

Paragraph 6 of Appellees' said statement (Mo. Dis. p. 6) erroneously states that Appellants have an adequate remedy under Section 1094.5 of the California Code of Civil Procedure. This will be discussed *infra*.

II.

The Challenged Ordinance Commands the Demolition of Appellants' Buildings as Nuisances Per Se, Regardless of Whether They Are Dangerous in Fact or Whether, if Dangerous at All, They Are So Dangerous as to Require Their Demolition. This Is a Deprivation and Denial by California of Appellants' Right to Due Process of Law and Equal Protection of the Laws.

The most obvious flaw in the ordinance is the express, unequivocal condemnation to destruction under Section 96.112(d) [St. Jur. p. 47], as nuisances *per se* under Section 96.101.2 [St. Jur. p. 45], of buildings whose fire-resisting or weather-resisting characteristics do not meet the requirements of present law of a building newly constructed in the same location (Sec. 96.101(a)(13).) This means that four of Appellants' buildings of wood frame and wood exterior construction located in Fire District 2 are declared by the ordinance to be public nuisances *per se* and, because the nature of their materials of construction does not make them susceptible of "reasonable repair" to comply with the present building code they *must* be ordered vacated and demolished by Appellee Board.

The pleaded facts relevant to the above and the references thereto in the record are as follows:

Appellants' buildings include four wood frame and wood sided buildings [R. p. 11, lines 10-13, and p. 12,

lines 14-15 and 29-30]. They were constructed in accordance with the law in effect at the time they were built [R. p. 14, lines 3-4].

These buildings are located in Fire District 2 of the City of Los Angeles [R. p. 38, line 32, to p. 39, line 2].

Under present law the construction of buildings with exterior wooden walls would not be permitted on Appellants' land [R. p. 14, lines 7-11].

Appellees contend that because of their wooden construction these buildings cannot be made to conform to existing law without substantial reconstruction and therefore may be ordered demolished by appellee Board [R. p. 39, lines 2-14].

Section 96.101.2 declares all "dangerous buildings" to be "public nuisances" [R. p. 51, lines 22-26].

The complaint alleges that:

"Subsection 13 of Section 96.101 (a) purports to declare a building 'dangerous" and therefore a 'public nuisance':

"'Any building . . . which . . . has in any non-supporting part . . . less than 50 per cent, or in any supporting member less than 66 per cent, of the strength, fire-resisting qualities or characteristics or weather-resisting qualities or characteristics required by law or ordinance in the case of a newly constructed building of like area, height and occupancy in the same location.'" [R. p. 48, lines 14-23; St. Jur. p. 44].

The complaint alleges that:

"Section 96.112 (d) provides that:

"'In all cases where a dangerous building . . . cannot be reasonably repaired so that it will no

longer exist in violation of the terms of the Los Angeles Municipal Code, it shall be vacated and demolished.'" [R. p. 57, lines 11-16; St. Jur. p. 47].

The superimposing of the elaborate administrative inspection, notice and hearing provisions of Sections 90.102-117 serves no purpose so far as those wooden buildings are concerned. Their extinction is decreed in advance and regardless of any inspection, notice or hearing. It would serve no purpose for appellants to prove in such proceeding that said buildings do not constitute a public hazard of any kind. They are condemned by the ordinance to destruction because they are made of wood, regardless of all other considerations.

Similar efforts to destroy private buildings by legislative fiat have been denounced by the courts as an invasion of the owners' constitutional rights.

In *Armistead v. City of Los Angeles*, 152 Cal. App. 2d 319, 313 P. 2d 127 the Court set aside an order of appellee Board, issued under the authority of the challenged ordinance, to demolish a wooden building in Los Angeles. At 152 Cal. App. 2d 324-326, 313 P. 2d 131 the Court said:

"'. . . an owner of property . . . has a clear constitutional right to have it determined by due process whether in fact and law it is . . . a nuisance. As against this right, no ex parte declaration, however formal, by municipal authorities that it is a nuisance is final as against him.

"'. . . neither at common law nor under . . . express power can it (a city), by its mere declaration that specified property is a nuisance, make it one when in fact it is not.'

* * * * * * *

". . . the fact standing alone that a building within a fire district is of wooden construction will not justify an order of demolition by a city (*Liebman v. Richmond*, 103 Cal. App. 354 (284 Pac. 731).)"

In *City of Houston v. Lurie*, 148 Tex. 391, 224 S. W. 2d 871, 14 A. L. R. 2d 61 the court, at 14 A. L. R. page 66, quoted with approval from *Crossman v. City of Galveston*, 112 Tex. 303, 247 S. W. 810, 813, 26 A. L. R. 1210:

"'A wooden building, even though used as a livery stable, is not a nuisance per se . . . The mere declaration of the city commissioners that the building or its use constitutes a nuisance does not make it so.'"

Continuing, the Court said:

"The opinion in the *Crossman* case quotes with approval from *Stockwell v. State*, 110 Tex. 550, 221 S. W. 932, 934, 12 A. L. R. 1116, as follows:

"'The State, in the exercise of its public power, may denominate certain things to be public nuisances, and because of their having that character provide for their summary abatement. This power is limited to declaring only those things to be such nuisances which are so in fact, since *even the State may not denounce that as a nuisance which is not in fact.* Tiedeman's Limitation of Police Power, Section 122a.' (Emphasis added.)"

At 14 A. L. R. 2d. page 72 the Court said:

"In view of the jury's finding, supported by evidence, and the rule announced in the *Crossman* case, the trial court's judgment ordering the demolition

of the two story building is erroneous. The rule is:

"'The building having been lawfully erected before its locality was included within the fire limits, it could not, merely because of wooden construction be condemned as a nuisance, nor could the right of repair be denied unless the repair should amount to a substantial reconstruction of the building.'

* * * * * * *

"The quoted rule is an application of the principle that, while the right exists in the exercise of the police power to destroy property which is a menace to public safety or health; public necessity is the limit of the right and the property cannot be destroyed if the conditions which make it a menace can be abated in any other recognized way. *Polsgrove v. Moss*, 154 Ky. 408, 157 S. W. 1133; 39 Am. Jur., pp. 461-462, Sec. 186; 62 C. J. S., Municipal Corporations, §281, pages 631-632; *Crossman v. City of Galveston*, 112 Tex. 303, 316, 247 S. W. 810, 26 A. L. R. 1210."

In *Armistead, supra*, the California court also gave expression to the rule that a building which is a public nuisance in fact may not lawfully be destroyed for supposed public advantage unless

". . . in fairness and in justice there is no other way reasonably to correct the nuisance." (152 Cal. App. 2d at p. 324, 313 P. 2d at p. 130.)

The Supreme Court of California denied a hearing in *Armistead* (152 Cal. App. 2d at p. 326, 313 P. 2d 127.)

In the recent case of *Perepletchikoff v. City of Los Angeles*, 174 A. C. A. 749, 345 P. 2d 261 (October, 1959), the Court stated that a provision of the Los Angeles building code requiring conformance of an entire

building to present code if the cost of needed repairs should exceed 50% of the replacement cost of the building applies only to buildings constructed after enactment of that requirement and that

> ". . . for constitutional reasons demolition of a then existing building can be required only when it has reached the status of a nuisance in fact." (174 A. C. A. 759, 345 P. 2d at p. 268.)

The California courts have consistently held that more may not be done by public authorities in abating a public nuisance than is reasonably necessary to protect the public interest; that buildings may not be wholly destroyed if less drastic abatement will suffice.

> *Eaton v. Klimm,* 217 Cal. 362, 373, 18 P. 2d 678, 682;
>
> *Trans-Oceanic Oil Corp. v. Santa Barbara,* 85 Cal. App. 2d 776, 785, 194 P. 2d 148, 152.

Injunction is the proper remedy under California law to prevent invasion of private rights by public authorities in such cases.

> *Eaton v. Klimm, supra,* 217 Cal. at pp. 372-373, 18 P. 2d at p. 682.

This Court, therefore, faces the fact that California recognizes the unconstitutional character of the sort of ordinance here involved, but refuses to protect Appellants from enforcement of the challenged ordinance on the ground that the administrative procedure prescribed by the ordinance must first be exhausted before judicial relief may be invoked.

California errs in this, by applying a useful rule to an inappropriate situation. Appellants do not challenge the

rule that administrative procedure must be followed before invoking judicial remedies, *if the administrative agency is empowered to hear and decide on the basis of facts*. Appellants do challenge the attempt of California to stretch that rule to apply to the case at bar, in which the administrative agency is *precluded by the very ordinance establishing its administrative function from exercising any administrative discretion as to the matter under investigation—i. e*, whether the four wooden buildings are in fact public nuisances and, if so, whether their demolition is necessary to abate the nuisance.

The authorities cited by appellees do not support the proposition that appellants, under these circumstances, may not seek judicial relief without subjecting themselves to the sterile gesture of a useless administrative proceeding.

United States v. Superior Court, 19 Cal. 2d 189, 120 P. 2d 26 held that judicial relief was premature where the statute afforded an aggrieved person the right to full hearing by an administrative agency *that had the right to hear and decide the complaint on its merits*. It did not involve a situation, such as the instant one, where an administrative agency is set up with all the solemnity and accoutrements of law *but is denied by that law the power to decide the specific complaint on its merits*. The same is true of the several decisions of this Court cited at page 195 of the opinion in that case (19 Cal. 2d 189, 195). In none of them was the administrative agency hamstrung by the statute of its creation from deciding the rights of the party seeking relief. This is true also of the agencies involved in *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 109 P. 2d 942, 132 A. L. R. 732, and the cases cited and discussed therein at 17 Cal. 2d

pp. 292-295, 109 P. 2d at pp. 950-951, and of the other cases cited page 9 of the Motion To Dismiss.

In contrast is *Staub v. Baxley*, 355 U. S. 313, 2 L. Ed. 2d 302. A city ordinance provided that before one could lawfully solicit persons to join an organization requiring payment of a membership fee, the solicitor must apply for a permit to the mayor and council and supply information regarding the character and experience of the solicitor, whether and how he was compensated, and all about the organization he represented. *The solicitor was given the privilege of asking for a hearing and opportunity to present oral and written evidence.* The decision to grant or deny the permit was required to be made on the basis of the applicant's character, the nature of the organization represented and the welfare of the citizens of the city.

All the elements of a full-dress administrative determination were ostensibly provided by the ordinance, just as, in the case at bar, elaborate administrative machinery is set up.

In *Staub*, the plaintiff undertook to solicit union membership without applying for the license required by ordinance; was arrested, convicted, appealed unsuccessfully for protection by the State courts and, finally, invoked the constitutional protection of this Court. In extending that protection, this Court said (355 U. S. 319, 2 L. Ed. 2d 309):

> "The first of the nonfederal grounds relied on by appellee, and upon which the decision of the Court of Appeals rests, is that appellant lacked standing to attack the constitutionality of the ordinance because she made no attempt to secure a permit under it. This is not an adequate nonfederal ground of deci-

sion. The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance. *Smith v. Cahoon*, 283 U. S. 553, 562, 75 L. Ed. 1264, 1271, 51 S. Ct. 582; *Lovell v. Griffin*, 303 U. S. 444, 452, 82 L. Ed. 949, 954, 58 S. Ct. 666. 'The Constitution can hardly be thought to deny one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.' *Jones v. Opelika*, 316 U. S. 584, 602, 86 L. Ed. 1691, 1704, 62 S. Ct. 1231, 141 A. L. R. 514, dissenting opinion, adopted per curiam on rehearing, 319 U. S. 103, 104, 87 L. Ed. 1290, 1291, 63 S. Ct. 890."

The case of *Smith v. Cahoon*, 283 U. S. 553, 75 L. Ed. 1264, is identical in principle to the case at bar. There a state statute attempted to subject to uniform regulation all motor carriers, regardless of whether or not they were doing business as public utilities. *The statute required all carriers to make application for and submit to hearing on the question whether they were entitled to certificates of public convenience and necessity.* The appellant, a private carrier, did not comply, was arrested and sought his release by habeas corpus on the ground that the statute was unconstitutional as applied to him. This Court said (283 U. S. 562, 75 L. Ed. 1271):

"... The appellant did not apply for a certificate, and the principle is well established that when a statute, valid upon its face, requires the issue of a license or certificate as a condition precedent to carrying on a business or following a vocation, one who is within the terms of the statute, but has failed

to make the required application, is not at liberty to complain because of his anticipation of improper or invalid action in administration. . . . . This principle, however, is not applicable where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional right. In the present instance, the appellant has been arrested and held for trial. He is in jeopardy, and the state court, entertaining his application for discharge, has denied the constitutional right asserted. The question of the validity of the statute, upon which the prosecution is based, is necessarily presented."

* * * * * * *

". . . . It is true that the statute does not in express terms demand that a private carrier shall constitute itself a common carrier, but the statute purports to subject all the carriers which are within the terms of its definition to the same obligations. Such a scheme of regulation of the business of a private carrier, such as the appellant, is manifestly beyond the power of the state."

III.

The Refusal of California to Protect Appellants' Constitutional Rights Raises a Distinct Federal Question.

Appellants have contended throughout this litigation that their property rights, guaranteed by the Fourteenth Amendment have been invaded by the attempt to enforce the invalid ordinance against them. Now that California has refused the protection of those rights by its judicial arm a new federal question arises: May a State validly withhold judicial protection of private property rights guaranteed by the federal constitution?

California has refused relief on the ground that Appellants must first thread the administrative labyrinth of Sections 96.100-128 before they may be heard to suggest their constitutional right to due process and equal protection—a right that is nullified on the face of the challenged ordinance.

In *Staub v. Baxley, supra,* this Court said (355 U. S. 318, 2 L. Ed. 2d 309):

> "At the threshold, appellee urges that this appeal be dismissed because, it argues, the decision of the Court of Appeals was based upon state procedural grounds and thus rests upon an *adequate* nonfederal basis, and that we are therefore without jurisdiction to entertain it. Hence, the question is whether that basis was an *adequate* one in the circumstances of this case. 'Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; and where a case coming from a state court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court.' *First Nat. Bank v. Anderson,* 269 U. S. 341, 346, 70 L. Ed. 295, 302, 46 S. Ct. 135, and cases cited."

In *Carter v. Texas,* 177 U. S. 442, 44 L. Ed. 839, this Court said (177 U. S. 447, 44 L. Ed. 841):

> "But the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question, in the decision of which this court,

on writ or error, is not concluded by the view taken by the highest court of the state. *Neal v. Delaware*, 103 U. S. 370, 396, 397, 26 L. Ed. 567, 574; *Mitchell v. Clark*, 110 U. S. 633, 645, 28 L. Ed. 279, 283, 4 Sup. Ct. Rep. 170, 312; *Boyd v. Nebraska, ex rel. Thayer*, 143 U. S. 135, 180, 36 L. Ed. 103, 116, 12 Sup. Ct. Rep. 375."

To like effect:

Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113, 119, 80 L. Ed. 91, 97;

Ward v. Love County, 253 U. S. 17, 22, 64 L. Ed. 751, 758;

Lovell v. Griffin, 303 U. S. 444, 450, 82 L. Ed. 949, 952.

Looking through form to substance, this Court will perceive that California is bemused by the rules of state practice that (1) declaratory relief is discretionary with the court; and (2) administrative remedies must be exhausted before an application for judicial relief will be entertained. Preoccupied with these useful rules, California has failed or declined to see that they beg the essential federal question presented by Appellants' pleading: May Appellants be required, at great expense, to undergo the mockery of an "administrative" proceeding that can end in only one way—an order to demolish the four wooden buildings through retroactive application of the present building code, regardless of whether they are or any of them is, in fact, a public danger; or, if so, regardless of whether the danger can be overcome by means less drastic than demolition?

California has decided this basic federal question by ignoring it, just as Georgia ignored the Federal question

in *Staub, supra,* by criticizing the appellant's pleading as too general to raise specific constitutional issues (355 U. S. 318, 2 L. Ed. 2d 308.)

IV.

No Adequate Remedy Is Provided by California Code of Civil Procedure, Section 1094.5.

Section 1094.5, California Code of Civil Procedure, is the statutory method provided by California for judicial review of *completed* administrative action, as clearly appears from sub-section (a) thereof (Mo. Dis. Appendix A, first page.) It provides no means for obtaining a judicial recognition of the sterility of the challenged ordinance as applied to Appellants' wooden buildings.

As above shown, such a remedy is not adequate in that it compels Appellants to pursue an idle (and very expensive) administrative procedure, when all concerned know in advance the inevitable result, commanded by the ordinance. But the suggested remedy is futile for the further reason that, having completed the administrative procedure, Appellants would have to apply to the California court for a writ whose only function is to test the sufficiency of the evidence in and the fairness of the hearing accorded by the administrative agency. In such a proceeding, the constitutionality of the ordinance is not in issue.

The case of *Armistead v. City of Los Angeles,* 152 Cal. App. 2d 319, 313 P. 2d 127 illustrates this. Therein, appellees pursued the administrative procedure of Sections 96.100-128 against the property owner and a demolition order issued. The owner then pursued the remedy of judicial review now recommended by Appellees to Appellants. He sought a writ of mandate under Section

1094.5 Code of Civil Procedure. It was granted. But the reviewing court could only send the case back to appellee Board for further proceedings (152 Cal. App. 2d at 321, 313 P. 2d at p. 129). On appeal by appellees, the California District Court of Appeal affirmed, using language indicating that, in its opinion, Section 96.112 (d) is unconstitutional. The final result was that the property owner ended up right where he began, before appellee Board with his property under attack by an unconstitutional ordinance.

Conclusion.

The ordinance attempts to accomplish the destruction of Appellants' four wooden buildings merely because they are of wooden construction and without proof that they are dangerous at all, or so dangerous that their destruction is justifiable under the police power. The proceedings are so constituted that said buildings are necessarily included in the charges against Appellants' other buildings, because appellee Board refused, when requested, to separately describe the land on which they are located [R. p. 13, par. IX].

Appellants' only available remedy is an injunction against the further prosecution of said pending proceeding.

That remedy has been unconstitutionally withheld by California and this Court should accept jurisdiction.

The many other unconstitutional aspects of the ordinance pleaded in the complaint are briefly discussed in the Statement of Jurisdiction at pages 9-17 and are not again argued herein.

Respectfully submitted,

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